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NORTH CAROLINA REPORTS.

VOL. 139.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

[v.139]

FALL TERM, 1905.

BY

J. CRAWFORD BIGGS,

STATE REPORTER.

(VOL. III.)

DURHAM, N. C.:
PRESS OF THE SEEMAN PRINTERY.
1905.

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA,

FALL TERM, 1905.

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
HENRY G. CONNOR,
GEORGE H. BROWN, JR.,
WILLIAM A. HOKE.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

J. CRAWFORD BIGGS.

CLERK OF THE SUPREME COURT:

THOS. S. KENAN.

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JOSEPH L. SEAWELL.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

Name.	*District.*	*County.*
George W. Ward	First	Pasquotank.
Robert B. Peebles	Second	Northampton.
Henry R. Bryan	Third	Craven.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
William R. Allen	Sixth	Wayne.
T. A. McNeill	Seventh	Robeson.
Walter H. Neal	Eighth	Scotland.
Thomas J. Shaw	Ninth	Guilford.
Benjamin F. Long	Tenth	Iredell.
Erastus B. Jones	Eleventh	Forsyth.
James L. Webb	Twelfth	Cleveland.
W. B. Council	Thirteenth	Catawba.
M. H. Justice	Fourteenth	Rutherford.
Frederick Moore	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
Hallett S. Ward	First	Washington.
Walter E. Daniel	Second	Halifax.
L. I. Moore	Third	Pitt.
Charles C. Daniels	Fourth	Wilson.
Rudolph Duffy	Fifth	New Hanover.
Armistead Jones	Sixth	Wake.
C. C. Lyon	Seventh	Bladen.
L. D. Robinson	Eighth	Anson.
Aubrey L. Brooks	Ninth	Guilford.
William C. Hammer	Tenth	Randolph.
S. P. Graves	Eleventh	Surry.
Heriot Clarkson	Twelfth	Mecklenburg.
Moses N. Harshaw	Thirteenth	Caldwell.
J. F. Spainhour	Fourteenth	Burke.
Mark W. Brown	Fifteenth	Buncombe.
Thaddeus D. Bryson	Sixteenth	Swain.

LICENSED ATTORNEYS.

FALL TERM, 1905.

ADAMS, HENRY B., JR. ..... Union County.
ASKEW, EDWARD S. ..... Bertie County.
BELLAMY, WILLIAM M. ..... New Hanover County.
BOONE, ROBERT B., JR. ..... Durham County.
BOWER, JOHN C. ..... Ashe County
BRAMHAM, WILLIAM G. ..... Durham County.
BRAWLEY, SUMTER C. ..... Iredell County.
BRIDGERS, BURKE H. ..... New Hanover County.
BROCK, WALTER E. ..... Union County.
BYNUM, FREDERICK W. ..... Chatham County.
CHESHIRE, JOHN. ..... Edgecombe County.
CHISHOLM, WALTER A. ..... Moore County.
CLOUD, EDGAR B. ..... Polk County.
COATS, JOHN M. ..... Harnett County.
DIXON, BEN. F., JR. ..... Wake County.
DIXON, ROBERT H. ..... Chatham County.
FARRIS, EDWARD H. ..... Guilford County.
FEREE, THADDEUS S. ..... Randolph County.
FORD, JOS. F. ..... Buncombe County.
FOWLE, DANIEL G. ..... Wake County.
GAFFORD, JOHN W. ..... New Hanover County.
GUDGER, VONNO L. ..... Buncombe County.
HAMPTON, LAURENCE H. ..... Jackson County.
HAYWOOD, ALFRED W., JR. ..... Alamance County.
HENDERSON, D. EZEKIEL. ..... Onslow County.
JONES, GEORGE L. ..... Macon County.
KENAN, GRAHAM. ..... Duplin County.
LANE, HENRY P. ..... Rockingham County.
LONG, ISAAC F. ..... Union County.
LONG, JAY V. ..... Union County.
MARTIN, CHARLES H. ..... Johnston County.
NEWTON, JAMES S. ..... Duplin County.
PHARR, ROBERT B. ..... Mecklenburg County.
RAGLAND, JOHN W. ..... News Ferry, Va.
REDD, FOREST M. ..... Mecklenburg County.
RYALS, NATHAN T. ..... Johnston County.
SAWYER, ERNEST L. ..... Pasquotank County.
SCROGGS, JAMES W. ..... Forsyth County.
SKIPPER, CHARLES B. ..... Robeson County.
SWAIN, JOHN E. ..... Buncombe County.
SWINDELL, FREDERICK D. ..... Carteret County.
WEBB, WILLIAM P. ..... Franklin County.
WHISNANT, JOHN W. ..... Caldwell County.
WINSTON, PATRICK H. ..... Wake County.
WOOTEN, STEPHEN C. ..... Pitt County.
WRIGHT, GEO. H. ..... Buncombe County.

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Spring and Fall of 1906.

SUPREME COURT.

The Supreme Court meets in the City of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1906.	Fall Term, 1906.
First District	February 6	August 28
Second District	February 13	September 4
Third District	February 20	September 11
Fourth District	February 27	September 18
Fifth District	March 6	September 25
Sixth District	March 13	October 2
Seventh District	March 20	October 9
Eighth District	March 27	October 16
Ninth District	April 3	October 23
Tenth District	April 10	October 30
Eleventh District	April 17	November 6
Twelfth District	April 24	November 13
Thirteenth District	May 1	November 20
Fourteenth District	May 8	November 27
Fifteenth District	May 15	December 4
Sixteenth District	May 22	December 11

SUPERIOR COURTS.

Spring Terms date from January 1 to June 30.
Fall Terms date from July 1 to December 31.

(The parenthesis numeral following the date of a term indicates the number of weeks during which court may hold).

FIRST JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge W. H. Neal.

FALL TERM, 1906—Judge T. A. McNeill.

Beaufort—Feb. 12 (2); †Apr. 16 (1); *May 14 (1); Oct. 15 (2); Dec. 3 (3);

Currituck—Feb. 26 (1); Sept. 3 (1).

Camden—Mar. 5 (1); Sept. 10 (1).

Pasquotank—†Jan. 8 (2); Mar. 12 (2); Sept. 17 (1); †Nov. 26 (1).

Perquimans—Mar. 26 (1); Sept. 24 (1).

Chowan—Apr. 2 (1); Oct. 1 (1).

Gates—Apr. 9 (1); Oct. 8 (1).

Washington—Apr. 23 (1); Oct. 29 (1).

Tyrrell—Apr. 30 (1); Nov. 5 (1).

Hyde—May 21 (1); Nov. 19 (1).

Dare—May 7 (1); Nov. 12 (1).

SECOND JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge T. J. Shaw.

FALL TERM, 1906—Judge W. H. Neal.

Halifax—*Jan. 29 (1); Mar. 5 (2); June 4 (2); Aug. 20 (2); Nov. 26 (2).

Northampton—‡Jan. 22 (1); Mar. 26 (2); ‡Aug. 6 (1); Oct. 29 (2).

Warren—Feb. 12 (1); June 18 (2); Sept. 17 (2).

Bertie—‡Feb. 19 (1); Apr. 30 (2); ‡Sept. 10 (1); Nov. 12 (2).

Hertford—Feb. 26 (1); Apr. 23 (1); *Aug. 13 (1); Oct. 15 (2).

THIRD JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge B. F. Long.

FALL TERM, 1906—Judge T. J. Shaw.

Pitt—Jan. 15 (2); †Mar. 19 (2); Apr. 23 (2); Sept. 17 (2); †Nov. 5 (2).

Craven—†Feb. 12 (1); *April 9 (1); †May 7 (2); *July 2 (1); *Oct. 1 (1); †Oct. 8 (1); †Nov. 19 (2).

Greene—Feb. 26 (1); †May 28 (2); Sept. 3 (1); Dec. 3 (2).

Carteret—Mar. 12 (1); Oct. 15 (1).

Jones—Apr. 2 (1); Oct. 29 (1).

Pamlico—Apr. 16 (1); Oct. 22 (1).

FOURTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge E. B. Jones.

FALL TERM, 1906—Judge B. F. Long.

Franklin—Jan. 22 (2); Apr. 16 (2); *Aug. 20 (1); †Oct. 15 (2).

Wilson—Feb. 5 (2); May 7 (2); Sept. 3 (1); Nov. 12 (2).

Vance—Feb. 19 (2); May 21 (1); Oct. 1 (2).

Edgecombe—Mar. 5 (1); †Apr. 2 (2); Sept. 10 (1); †Oct. 29 (2).

Martin—Mar. 19 (1); June 18 (1); Sept. 17 (1); Dec. 10 (1).

Nash—Mar. 12 (1); Apr. 30 (2); Aug. 27 (1); Nov. 26 (2).

FIFTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge James L. Webb.

FALL TERM, 1906—Judge E. B. Jones.

New Hanover—*Jan. 22 (2); *Apr. 2 (1); †Apr. 9 (2); †May 28 (2); *July 23 (2); *Sep. 24 (1); †Oct. 1 (2); †Dec. 3 (1).

Pender—Jan. 15 (1); Mar. 26 (1), Sept. 10 (2).

Duplin—Feb. 19 (2); Aug. 27 (2); Nov. 19 (2).

Sampson—Feb. 5 (2); Apr. 30 (2); Aug. 6 (2); Oct. 22 (2).

Lenoir—Jan. 8 (1); Mar. 12 (2); May 21 (1); June 11 (2); Aug. 20 (1); Nov. 5 (2); Dec. 10 (2).

Onslow—Mar. 5 (1); Apr. 23 (1); July 16 (1); Oct. 15 (1).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

SIXTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge W. B. Councill.

FALL TERM, 1906—Judge James L. Webb.

Harnett—Feb. 5 (2); May 21 (1); Sept. 3 (1); †Nov. 12 (2).

Johnston—Mar. 5 (2); Sept. 10 (2); Dec. 10 (2).

Wake—*Jan. 8 (2); †Feb. 19 (2); *Mar. 26 (2); †Apr. 23 (2); *July 9 (2); *Sept. 24 (2); †Oct. 22 (3).

Wayne—Jan. 22 (2); Apr. 9 (2); Aug. 20 (2); Nov. 26 (2).

SEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge M. H. Justice.

FALL TERM, 1906—Judge W. B. Councill.

Columbus—Feb. 26 (1); Apr. 16 (2); Sept. 3 (1); Nov. 26 (1).

Cumberland—*Jan. 15 (1); †Feb. 19 (1); ‡Mar. 26 (1); †Apr. 30 (2); *May 28 (1); *Aug. 27 (1); †Oct. 22 (2); *Nov. 19 (1).

Robeson—*Feb. 5 (2); †Apr. 2 (2); †May 21 (1); *July 23 (1); †Sept. 10 (2); *Nov. 5 (2); †Dec. 4 (1).

Bladen—Jan. 8 (1); Mar. 12 (1); Oct. 15 (1).

Brunswick—Mar. 20 (1); Sept. 25 (1).

EIGHTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge Fred. Moore.

FALL TERM, 1906—Judge M. H. Justice.

Anson—*Jan. 15 (1); †Feb. 12 (1); †Mar. 5 (1); *Apr. 16 (1); †May 14 (1); †June 11 (1); *Sept. 10 (1); †Oct. 8 (1); †Dec. 3 (1).

Chatham—Feb. 5 (1); May 7 (1); †Aug. 6 (1); Nov. 12 (1).

Moore—†Jan. 22 (1); †Mar. 26 (1); *Apr. 23 (1); †May 21 (2); *Aug. 13 (1); †Sept. 17 (1); *Nov. 19 (1); †Dec. 10 (1).

Richmond—*Jan. 8 (1); †Apr. 2 (2); *Sept. 3 (1); †Sept. 24 (2).

Scotland—†Mar. 12 (1); *Apr. 30 (1); June 4 (1); *Sept. 17 (1); †Oct. 22 (1).

Union—*Jan. 29 (1); †Feb. 19 (2); *Mar. 19 (1); *July 30 (1); †Aug. 20 (2); *Oct. 29 (2).

NINTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge Garland S. Ferguson.

FALL TERM, 1906—Judge Fred. Moore.

Durham—*Jan. 8 (1); †Jan. 22 (2); †Mar. 19 (2); *May 14 (1); *Aug. 27 (1); †Oct. 1 (2); *Dec. 3 (1).

Guilford—†Jan. 1 (1); †Jan. 15 (1); †Feb. 12 (2); *Feb. 26 (1); *Apr. 2 (1); †Apr. 16 (2); †June 4 (2); *June 18 (1); †Aug. 21 (1); *Sept. 17 (1); †Oct. 22 (2); *Dec. 10 (1).

Granville—Feb. 5 (1); Apr. 30 (2); July 30 (1); Nov. 19 (2).

Alamance—Mar. 5 (1); †May 28 (1); Sept. 3 (2); *Nov. 5 (1).

Orange—Mar. 12 (1); †May 21 (1); Aug. 6 (1); Oct. 15 (1).

Person—Apr. 9 (1); Aug. 13 (1); Nov. 13 (1).

TENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge George W. Ward.

FALL TERM, 1905—Judge Garland S. Ferguson.

Montgomery—*Jan. 22 (1); †Apr. 16 (1); Sept. 17 (2).

Iredell—Jan. 29 (2); May 21 (2); July 30 (2); Oct. 29 (2).

Rowan—Feb. 12 (2); May 7 (2); Aug. 27 (2); Nov. 19 (2).

Davidson—Feb. 26 (2); †Apr. 23 (1); Aug. 13 (2); †Nov. 12 (1).

Stanly—*Jan. 15 (1); †Mar. 12 (1); *July 9 (1); †Sept. 10 (1).

Randolph—Mar. 19 (2); July 16 (2); Dec. 3 (2).

Davie—Apr. 2 (2); Oct. 1 (2).

Yadkin—Apr. 30 (1); Oct. 15 (2).

ELEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge R. B. Peebles.

FALL TERM, 1906—Judge George W. Ward.

Ashe—Jan. 22 (2); May 28 (2); Oct. 22 (2).

Forsyth—*Feb. 12 (2); †Mar. 12 (2); May 21 (2); *July 24 (1); †Sept. 10 (2); *Oct. 8 (1); †Dec. 3 (2).

Rockingham—Feb. 26 (2); †June 11 (2); *July 30 (1); Nov. 5 (2).

Alleghany—Mar. 26 (1); Aug. 20 (1).

Caswell—Apr. 16 (1); Oct. 15 (1).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

Surry—Feb. 5 (1); Apr. 23 (1); †Aug. 27 (2); Nov. 19 2).
Stokes—May 7 (2); Sept. 24 (2).

TWELFTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge H. R. Bryan.
FALL TERM, 1906—Judge R. B. Peebles.
Mecklenburg—†Jan. 15 (2); *Feb. 12 (2); †Mar. 12 (2); *Apr. 23 (1); †Apr. 30 (1); *June 4 (1); †June 11 (1); †July 16 (2); *Aug. 13 (2); *Sept. 24 (1); †Oct. 1 (3); †Nov. 26 (1); *Dec. 3 (1).
Cleveland—Mar. 26 (2); July 30 (2); Nov. 5 (2).
Gaston—Feb. 26 (2); May 21 (2); Sept. 10 (2); Nov. 19 (1).
Lincoln—Apr. 9 (1); Sept. 3 (1); Dec. 10 (1).
Cabarrus—Jan. 29 (2); May 7 (2); Aug. 27 (1); Oct. 22 (2).

THIRTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge Charles M. Cooke.
FALL TERM, 1906—Judge H. R. Bryan.
Wilkes—*Mar. 5 (1); †June 18 (1); *Aug. 20 (1); †Oct. 8 (2).
Catawba—Feb. 5 (2); †May 7 (2); July 9 (2); Oct. 29 (2).
Alexander—Feb. 19 (1); Oct. 1 (1).
Caldwell—Feb. 26 (1); *Sept. 17 (2); †Nov. 26 (2).
Mitchell—May 21 (2); Nov. 12 (2).
Watauga—Mar. 26 (2); June 18 (1); Aug. 7 (2).

FOURTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge Oliver H. Allen.
FALL TERM, 1906—Judge Charles M. Cooke.
Yancey—Mar. 26 (2); †June 18 (1); Sept. 3 (2).
McDowell—†Jan. 22 (2); Feb. 19 (2); July 23 (2); Sept. 17 (2).
Henderson—*Mar. 5 (1); ‡May 14 (2); *Oct. 1 (2); ‡Nov. 12 (2).
Rutherford—†Feb. 5 (2); Apr. 9 (2); †Aug. 20 (2); Oct. 29 (2).
Polk—Apr. 23 (2); Oct. 15 (2).
Burke—Mar. 12 (2); †June 4 (2); Aug. 6 (2); †Dec. 3 (2).

FIFTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge W. R. Allen.
FALL TERM, 1906—Judge Oliver H. Allen.
Buncombe—Feb. 5 (3); †Mar. 12 (4); Apr. 23 (2); †May 28 (4); July 30 (2); †Sept. 10 (6); Nov. 12 (2); †Dec. 3 (2).
Madison—†Jan. 22 (2); *Feb. 26 (2); †May 7 (2); *Aug. 13 (2); †Oct. 22 (2).
Transylvania—Apr. 9 (2); Aug. 27 (2); Nov. 26 (1).

SIXTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1906—Judge T. A. McNeill.
FALL TERM, 1906—Judge W. R. Allen.
Haywood—Jan. 29 (3); July 9 (2); Sept. 24 (2).
Jackson—Feb. 19 (2); †May 21 (2); October 8 (2).
Swain—Mar. 5 (2); July 23 (2); Oct. 22 (2).
Graham—Mar. 19 (2); Sept. 3 (2).
Cherokee—Apr. 2 (2); Aug. 6 (2); Nov. 5 (2).
Clay—Apr. 16 (1); Sept. 17 (1).
Macon—Apr. 23 (2); Nov. 19 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

JETER C. PRITCHARD, Judge, Asheville, N. C.

DISTRICT COURTS.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

Terms.—Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

Terms.—Elizabeth City, third Monday in April and October.
New Bern, fourth Monday in April and October.
Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

OFFICERS.

Harry Skinner, United States District Attorney, Raleigh.
J. A. Giles, Assistant United States District Attorney, Durham.
Henry C. Dockery, United States Marshal, Rockingham.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.
Samuel P. Collier, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Wilmington.

DEPUTY CLERKS.

George L. Tonnoffski, Raleigh.
James K. Collier, Wilmington.
George Green, New Bern.
John P. Overman, Elizabeth City.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at the same time and place, as follows:
Greensboro, first Monday in April and October, Samuel L. Trogden, Clerk.
Statesville, third Monday in April and October, H. C. Cowles, Clerk.
Asheville, first Monday in May and November, W. S. Hyams, Clerk.
Charlotte, second Monday in June and December, H. C. Cowles, Clerk.

A. E. Holton, United States District Attorney, Winston.
A. H. Price, Assistant United States District Attorney, Salisbury.
J. M. Milliken, United States Marshall, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FALL TERM, 1905.

DAVIDSON v. BARDIN.

(Filed September 12, 1905).

Evidence—Personal Transaction with Deceased.

In an action to recover for services rendered the defendant's intestate, the testimony of plaintiff that she "gave him medicine, prepared his nourishment, kept him clean and cared for him generally, he was helpless altogether; we had to do all the services and wait on him," was incompetent under section 590 of The Code, this being a "personal transaction" with deceased.

ACTION by Mary E. Davidson and B. F. Davidson, her husband, against J. D. Bardin, Administrator of Richard Bardin, heard by *Judge B. F. Long* and a jury, at the Spring Term, 1905, of the Superior Court of PERQUIMANS County.

Aydlett & Ehringhaus for the plaintiffs.
Pruden & Pruden for the defendant.

DAVIDSON *v.* BARDIN.

CLARK, C. J. This is an action to recover for labor alleged to have been performed for seven years prior to his death, in waiting upon, caring for and nursing the defendant's intestate and his wife, both of whom were very old and feeble, and not related to the plaintiffs.

The *feme* plaintiff was allowed to testify as a witness in her own behalf over defendant's objection and exception that she "gave him medicine, prepared his nourishment, kept him clean and cared for him generally. He was helpless altogether; we had to do all the services and wait on him." This was clearly a "personal transaction" with the deceased, and the witness was incompetent under The Code, 590. It is true that His Honor excluded any conversation, but the statute excludes not merely any "communication," but also any "personal transaction."

The cases relied upon by the plaintiff merely sustain the proposition that the witness would have been competent to testify to any "substantive and independent fact" that was not a "communication or personal transaction" with the deceased, as in *Gray v. Cooper*, 65 N. C., 183, that the deceased had possession and use of the slaves, or *March v. Verble*, 79 N. C., 19, that the deceased had owned but one bull since the war and what he was worth—or *Cowan v. Layburn*, 116 N. C., 526, that the plaintiff carried provisions to the deceased at her house and that she had no other provisions, the court being careful to add that it did not appear whether the deceased accepted or refused the provisions, thus excluding any "personal transaction," the actual delivery. In all these cases, the possession of the slaves and of the bull, and carrying provisions to the house of defendant's intestate were independent, substantive facts, like proving the value of an article sold to the intestate (the sale and delivery being proven by another), *March v. Verble, supra*; and that witness saw the book in hands of intestate, but not that she handed him the book, which last was held incompetent.

Lane v. Rogers, 113 N. C., 171, or the numerous cases (Clark's Code, 3rd Ed., p. 845) that the plaintiff can prove the handwriting of defendant's intestate, but not that he saw him sign the paper sued on.

Under these decisions, the plaintiff was competent to testify that she went to the house of defendant's intestate, and his condition, and what she saw or heard, so long as these were independent facts and did not tend to show a "communication or personal transaction" between her and the deceased, whereby a liability to her, express or implied, would accrue. His mouth being closed by death to deny the contract, the law enforces equality of condition by forbidding her to prove an express contract by showing a "communication," or an implied contract by showing a "personal transaction" as the rendition and acceptance of services, which was the object of the evidence here admitted. The witness "may testify to any fact which does not include a personal transaction or communication." *McCall v. Wilson,* 101 N. C., 598; *Johnson v. Rich,* 118 N. C., 268.

Error.

BONNER v. STOTESBURY.

(Filed September 12, 1905).

Witnesses for Deceased—Section 590 of Code—Amendments to Pleadings—Fraud—Statute of Limitations.

1. Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, *held,* such testimony does not fall within the inhibition of section 590 of The Code, which is intended to protect the deceased person's representative or assignee, who is suing or being sued.

2. Where the plaintiff moved below to amend his complaint, and the court intimated that it would allow the amendment if the plaintiff's evidence was sufficient to warrant it, but by reason of an erroneous exclusion of testimony, the plaintiff was prevented from developing his whole case and was driven to a nonsuit, this court will not dismiss the action either because the complaint is defective or because the cause of action as stated is barred by the statute of limitations.

3. Upon the question of fraudulent concealment of funds, section 155 (9), of The Code, applies only where the ground of the action for relief is fraud or mistake and the statute runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hitherto unknown to him.

4. While this court has the power of amendment, it will not exercise this power where the amendment would, perhaps, present a case substantially different from the one which was tried below and raise a question of law not involved in the present appeal.

ACTION by Selby Bonner, Administrator of Mary E. Bonner, against C. A. Stotesbury and C. A. Stotesbury, executor of R. B. Stotesbury, heard by *Judge G. W. Ward* and a jury, at the Spring Term, 1905, of the Superior Court of HYDE County.

Plaintiff alleges that his intestate deposited with one Benson a certain sum of money subject to her order and that from time to time Benson, on her demand, made payments to her, having at her death, in his hands, as her depositary, a balance of $260. That soon after her death, and presumably in September, 1898, defendant C. A. Stotesbury, received said money from Benson without having taken out letters of administration, and immediately paid over to R. B. Stotesbury, his testator, a considerable portion of the same, the amount not being known to plaintiff. Plaintiff also alleges the death of Mary E. Bonner, and the qualification of plaintiff, on the 18th day of February, 1905, as her administrator, the death of R. B. Stotesbury in 1904, and the qualification of the defendant, C. A. Stotesbury, as his executor.

Defendant, in his answer, denied the allegations of the complaint and pleaded the statute of limitations. At the trial, the court submitted two issues to the jury, which are as follows: "1. Are the defendants indebted to the plaintiff, and if so, in what sum?" "2. Is the plaintiff's claim barred by the statute of limitations?" Plaintiff introduced C. F. Benson as a witness and asked him what funds of Mrs. Bonner he had in his hands at her death? Defendants' counsel objected and the witness then stated, in answer to a question of defendants' counsel, "that he knew nothing about the funds except what Mrs. Bonner told him and put in his hands." The objection was sustained and plaintiff excepted. Plaintiff's counsel also asked the witness if he had paid any money to C. A. Stotesbury since the death of Mary E. Bonner, plaintiff's intestate? The question, on objection by defendants' counsel, was excluded by the court and plaintiff excepted. The witness was then asked by plaintiff's counsel, if Mary E. Bonner had deposited any money with him prior to her death, and if so, how much? This question was also excluded, on objection by defendants' counsel, and plaintiff excepted. It was stated by counsel in this court and not denied, that the plaintiff moved in the court below to amend his complaint by alleging a conspiracy between Benson and the Stotesburys to defraud the estate of plaintiff's intestate out of said fund so deposited with Benson, and the court stated that it would first hear the testimony of plaintiff and then pass upon the motion to amend. In the brief of defendants' counsel, it is admitted that "the court permitted the plaintiff to amend his complaint." We take it that this admission refers to what the judge said, as stated by plaintiff's counsel, when the motion to amend was made. No amendment was actually made in the Superior Court. The court intimated that it would charge the jury that, if they believed the evidence, they should answer the first issue "no," and the

second issue "yes." Plaintiff thereupon, in deference to the intimation, submitted to a nonsuit and appealed.

S. S. Mann for the plaintiff.
H. S. Ward and *Aydlett & Ehringhaus* for the defendants.

WALKER, J., after stating the case: It was admitted here that the court excluded the testimony of the witness, Benson, as being incompetent under section 590 of The Code. In this we think there was error. Benson was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, and the transaction between him and Stotesbury was of course confined to living persons. The proposed testimony, as to the transactions between him and Mrs. Bonner, was offered by the party to the suit who represented the dead person. Such testimony does not fall within the inhibition of section 590 of The Code. That statute was intended to protect the deceased person's representative or assignee, who is suing or being sued in the action, and for the reason that the living party to the transaction or communication, who is a party to or interested in the event of the action, or the person under whom he claims, should not, in all fairness, be permitted to speak concerning it, when the other party, who is dead, cannot be heard in reply. *McCanless v. Reynolds*, 74 N. C., 301. It was said on the argument that if the plaintiff recovered of Stotesbury, the witness, Benson, will be liable over to him. Not conceding that this would be so under the facts and circumstances of this case, we are unable to see, if we admit the correctness of the proposition, how it affects the question one way or another. In the cases cited by counsel, the witness, who was liable over, was introduced to testify against the representative of a deceased person as to a transaction or communication between him and the tes-

tator. *Lyon v. Pender,* 118 N. C., 147; *Fertilizer Co. v. Rippy,* 123 N. C., 656, and 124 N. C., 643. But not so here, as we have seen. The testimony ruled out by His Honor is within neither the letter nor the spirit of the statute and was therefore improperly excluded. The two cases of *Bunn v. Todd,* 107 N. C., 266, in which the present *Chief Justice* analyses section 590 with great clearness, and *Yow v. Hamilton,* 136 N. C., 357, are decisive authorities against the ruling. The court said in the last case, referring to that section: "It is there provided that an interested witness or a person from, through or under whom a party to be affected by the event of the action, claims, shall not testify concerning a personal transaction or communication between the witness and a person then deceased under whom the party against whom he is introduced as a witness claims." We see, therefore, that the witness must be introduced to testify against the representative or assignee of the deceased person.

It was contended by the defendants' counsel that even if the witness, Benson, was competent, the plaintiff had stated no cause of action and if he had that it is barred by the statute of limitations. It was admitted in this court by counsel that the plaintiff moved below to amend his complaint and the court intimated that it would allow the amendment, if the plaintiff's evidence was sufficient to warrant it, and it would therefore hear the evidence before ordering the amendment. In the brief of defendants' counsel, it is stated that, "at the hearing the court permitted the plaintiff to amend his complaint." As the ruling of the court upon the competency of the witness, Benson, was erroneous and, by reason thereof, the plaintiff was prevented from developing his whole case and was driven to a nonsuit, we would not be willing to dismiss his action or to sustain the nonsuit on the ground stated by the defendants' counsel, even if we should hold the complaint to be defective. This ruling also applies to the contention that the plaintiff's cause of action as now stated is

barred by the statute of limitations. The plaintiff has not had a fair opportunity to amend his complaint, in order to avoid the operation of the statute, no more than he has had a fair chance to perfect the statement of his cause of action, if in either case amendment is required, which we do not decide. Plaintiff's counsel stated here that he would allege in his amended pleading a fraudulent concealment by Benson and Stotesbury of the fact that they had the money of his intestate and a conspiracy between them to cheat and defraud plaintiff out of said money. It was not made clear to us in what the alleged combination to defraud consisted, nor how, in a legal sense, it injured the plaintiff. But we may be enlightened as to this by counsel when the amendment is made, if the case should come back to us. Upon the question of fraudulent concealment, it may be said, that The Code, section 155 (9), applies only when the "ground" of the action for relief is fraud or mistake and the statute runs "from the discovery of the facts constituting fraud or mistake, and not from the discovery by a party of rights hitherto unknown to him." *Dunn v. Beaman*, 126 N. C., 766.

Plaintiff moved in this court to amend his complaint. As the amendment would, perhaps, present a case substantially different from the one which was tried below and raise a question of law not involved in the present appeal, we could not allow the motion if in other respects we had the power to do so. *Whitehead v. Spivey*, 103 N. C., 66; *Howard v. Insurance Co.*, 125 N. C., 49. This court undoubtedly has the power of amendment, but this is not a case which calls for its exercise.

There must be a new trial because of the error committed by the court in rejecting testimony which was offered and the plaintiff may amend below by permission of the court, if so advised.

New Trial.

LATHAM v. LUMBER CO.

(Filed September 12, 1905).

Action for Waste—Contingent Remaindermen.

1. While the owner of the inheritance, either by way of reversion or vested remainder can maintain an action for waste, yet one entitled to a contingent remainder cannot maintain such an action, but the interest of a contingent remainderman in the timber will be protected by a Court of Equity by injunction.

2. Where lands were devised to a daughter for life "and after her death, the said lands are to go to the children of my said daughter and the children of such as are dead," and the life tenant, who is living, had several children, one of whom married and died, leaving the plaintiffs the issue of such marriage, *held*, the plaintiffs have but a contingent remainder, which may never vest, and they cannot during the life of the life tenant maintain an action for waste for timber cut.

ACTION by Thos. H. Latham and others against Roanoke Railroad and Lumber Co., heard by *Judge G. W. Ward* upon the pleadings and facts agreed at the July Special Term of the Superior Court of WASHINGTON County.

William Alsbrook devised the land from which the timber in controversy was cut to his daughter, Sabra Harrison, for life, concluding with the words: "And after her death the said land and negroes are to go to the children of my said daughter and the children of such as are dead." Sabra Harrison, who is living, had thirteen children, one of whom intermarried with B. D. Latham and died, leaving the plaintiffs the issue of such marriage. During the year 1892 a special proceeding was instituted in the Superior Court of Washington County by said Sabra Harrison and her then living children, including the mother of plaintiffs, and the children of such as were dead, for the purpose of procuring an order for the sale of the timber on said land. At said

sale, by a commissioner appointed in said proceeding, the defendant corporation purchased, paid for and took a deed for said timber. The mother of plaintiffs received her share of the purchase money therefor. The plaintiffs were not parties to said proceeding. Mrs. Latham died prior to the commencement of this action. They sue for one-thirteenth of the value of the timber—found by the jury to be $159, less $43.65, the value of the life estate of Mrs. Harrison. His Honor being of the opinion upon the foregoing facts that the plaintiffs were not entitled to recover, rendered judgment accordingly, and they appealed.

H. S. Ward for the plaintiffs.
A. O. Gaylord for the defendant.

CONNOR, J. The plaintiffs having neither the possession, nor the right thereto, cannot maintain an action for trespass. The authorities cited by their counsel in his well considered brief amply sustain the right of the owner of the inheritance, either by way of reversion or vested remainder, to sue for waste and recover the damage to the inheritance. *Burnett v. Thompson,* 51 N. C., 210; *Walls v. Williams,* 91 N. C., 477; *Dorsey v. Moore,* 100 N. C., 41. It is equally well settled that one entitled to a contingent remainder cannot maintain an action to recover damages for waste. *Hunt v. Hall,* 37 Me., 363. That was "An action on the case in the nature of waste." The land upon which the timber was cut was devised to the wife of the testator for life, remainder, "after her death" to the children of testator and "the heirs of such as may then be deceased." It was held that the plaintiffs, children of the deceased daughter, could not maintain the action during the life of the first taken. This case is cited with approval by *Mr. Justice Walker* in *Bowen v. Hackney,* 136 N. C., 193; *Mays v. Feaster,* 2 McCord Eq. (S. C.), 137; 30 Am. & Eng. Enc., (2 Ed.), 275. The interest of a contingent

remainderman in the timber will be protected by a court of equity by injunction. *University v. Tucker,* 31 W. Va., 621. It therefore becomes necessary to consider and decide the question whether plaintiffs took, under the will, upon the death of their mother, a vested or contingent remainder. Their counsel contends that the mother took but a contingent remainder dependent upon her surviving the life tenant. His view is thus clearly stated in his brief: "If one of the children of Sabra Harrison die before she does, the remainder is at an end and can never vest and another remainder to her children is substituted who can take nothing from their parent, but under the will." After further discussion he says: "It is made clear, we think, that the time at which the limitation should take effect in interest and not merely in enjoyment, was at the death of Sabra Harrison. The will expressly says so." The authorities cited sustain his contention. *Whitesides v. Cooper,* 115 N. C., 570; *Bowen v. Hackney,* 136 N. C., 187, in which the cases are cited and reviewed by *Mr. Justice Walker; Irvin v. Clark,* 98 N. C., 444; *Hunt v. Hall, supra; Olney v. Hull,* 21 Pick., 301. It being conceded that only those children of Mrs. Sabra Harrison, who are living at the time of her death, can take the land, why is it not equally true that only those of her grandchildren who are living at that time can take under the will, and that until such time the remainder is contingent? How is it to be known until that time whether the plaintiffs, or any of them, will ever take any estate in the land? If all recover the value of the timber and one or more of them die before the death of Mrs. Harrison, is it not manifest that such as may die before her death have never sustained any damage by the act of defendant in cutting the timber, what is to prevent those who may survive recovering the share which would have vested in those who have died? The death of either will disturb the share or proportion of the survivors. If all should die it may be that as those who would in that

event take were parties to the special proceeding they would not be entitled to recover for the share which would have accrued to plaintiffs. Without deciding any of these questions, it is clear that plaintiffs, during the life of Mrs. Harrison, have but a contingent remainder which may never vest. The plaintiffs' counsel insist that although they have sought to recover only one-thirteenth of the value of the timber upon the theory that plaintiffs, will at the death of Mrs. Harrison, take by substitution the share which would have vested in their mother if she had survived, that they are in fact entitled to share equally, when the life estate falls in, with all of the children and grandchildren upon a *per capita* basis of division. If he is correct in this view it is manifest that they may not recover in this action, for it is impossible to say now what amount they may then be entitled to. No one can foresee how many deaths may occur during Mrs. Harrison's life, or how such deaths would affect the rights of the plaintiffs if they survive her. It is possible that by the death of several of the children, leaving a number of grandchildren, the share upon a *per capita* division would be materially diminished. These are contingencies which obstruct the plaintiffs' right to recover in this action. It would seem, therefore, that for the purpose of disposing of this appeal it is immaterial whether the plaintiffs or such of them as may then be *in esse*, will upon the death of Mrs. Harrison, take by substitution or *per capita*. The question is not free from difficulty. As the conclusion to which His Honor arrived puts an end to this action, it is not necessary to decide the other interesting questions discussed by counsel.

The judgment of His Honor must be

Affirmed.

PITCHFORD v. LIMER.

(Filed September 12, 1905).

Wills—Rule in Shelley's Case—Executory Devises.

1. Where by a clause in a will, land is given to P "for life, and after his death to his heirs (lawful) forever," P took an estate in fee simple under the Rule in Shelley's Case.

2. Where a will gave to a son who resided in Mississippi, the privilege of coming back to North Carolina and taking certain land, or remaining where he was, and receiving other benefits under its terms, and he preferred to remain in Mississippi and elected to take other property bestowed upon him by the will, *held*, the estate in said land never vested in him, it being an executory devise dependent upon a contingency which did not occur, and the doctrine that conditions in restraint of alienation are void has no application.

ACTION of ejectment by T. J. Pitchford and others against Jane Limer, heard on case agreed before *Judge E. B. Jones*, at the June Term, 1905, of the Superior Court of WARREN County.

Thomas J. Pitchford, Sr., died leaving a last will and testament, and the rights of the parties to this controversy depend on the correct construction of the following clause in said will: "As I have heretofore given my son, John C. Pitchford, nothing or nearly so, I hereby give him the privilege of selecting tract No. 1, containing the dwelling house, in full right and title to him and his heirs forever, on this condition, however, that he reside on the place. If he refuse this offer, as I trust he will not, then the same offer is hereby made to my son, Thomas J. Pitchford, on condition that he resign fully all claim, if any he may think he has, to tract No. 2, and on the further condition that he is hereby given a life interest therein, and after his death to his heirs (lawful) forever."

John C. Pitchford, referred to in the clause, did not elect to take the property therein described, but received other benefits under the will given him in case he determined not to accept the property. The defendant holds his title under deeds in fee from both John C. and Thomas J. Pitchford, Jr., mentioned in this clause of the will. The plaintiffs are the children and heirs at law of this Thomas J. Pitchford, Jr., now deceased, and maintain their right to recover on the ground that John C. Pitchford, having elected not to take the tract of land in controversy, nothing passed to the defendant by his deed; and that under this clause of the will, their father (Thomas J. Pitchford, Jr.,) took a life estate, and he having died, the plaintiffs who are his children and heirs at law, own and have a present right to recover the property.

On the facts agreed the court below adjudged as follows: "The construction of the will of Thomas J. Pitchford, Sr., touching the rights of plaintiff and defendant, having upon a written statement of facts agreed been submitted to the court, the court files the following judgment: The court is of opinion, and so holds, that John C. Pitchford, having failed to reside upon tract No. 1, as designated in clause 3 of the will, did not take title in fee to said tract No. 1. But the court is further of opinion, and so holds, that Thomas J. Pitchford, under clause 3 in the will, took title in fee to tract No. 1, under the Rule in Shelley's Case, and Thomas J. Pitchford, Jr., having joined with his wife in the conveyance to A. C. Cook, trustee, the title in fee by *mesne* conveyances passed to the defendant. It is therefore ordered and adjudged that the plaintiff recover nothing by his suit and that the defendant go without day and recover his costs." Both plaintiffs and defendant excepted and appealed.

Pittman & Kerr for the plaintiffs.

T. T. Hicks and *Tasker Polk* for the defendant.

PLAINTIFFS' APPEAL.

HOKE, J., after stating the facts: The plaintiffs excepted to that portion of the judgment which held that Thomas J. Pitchford, Jr., by the terms of the will, took an estate in fee simple under the Rule in Shelley's Case. There is no error in this ruling. By the clause in question the property is given to Thomas J. Pitchford "for life, and after his death, to his heirs (lawful) forever." Such words have been generally held to convey a fee simple, and there is nothing in this will which makes or tends to make this an exception to the general rule. *Edgerton v. Aycock,* 123 N. C., 134; *Wool v. Fleetwood,* 136 N. C., 460; *Cooper Ex parte, ibid.,* 130; *Britt v. Lumber Co., ibid.,* 171.

The court is referred by the plaintiff to the case of *Bird v. Gilliam,* 121 N. C., 326 (overruled in 123 N. C., 63, but not on this point), to *Rollins v. Keel,* 115 N. C., 68, and some other authorities of like kind, but these cases were decided on the ground that, by reason of certain qualifying and explanatory words or clauses of the will, the terms "heirs or heirs of the body" could not be given their simple and ordinary import, "carrying the estate to the whole line of heirs of the sort described to take in succession as such heirs," but were to be considered in a different or more restricted sense, by which they were changed from words of limitation to words of purchase. There are no such qualifying or explanatory words in the clause we are now considering, and the general rule of construction must prevail. There is

No Error.

DEFENDANT'S APPEAL.

HOKE, J. The defendant excepted to that part of the judgment which holds that John C. Pitchford took nothing under this clause of the will by reason of not complying with the condition imposed, and seeks to sustain his position on

the ground that the condition requiring in effect that John C. Pitchford should remain upon the property is one in restraint of alienation, and therefore the condition is void and the estate is good.

It is true that where an estate has vested, a condition in general restraint of alienation or entirely repugnant to its nature will be declared void. The doctrine is sound, but there is nothing in this case which permits its application. The will simply gave to John C. Pitchford, who resided in Mississippi, the privilege of coming back to North Carolina and taking the property, or of remaining where he was and receiving other benefits under its terms. He preferred, it seems, to remain in Misissippi and elected to take other property bestowed upon him by the will. The estate, therefore, never vested in him. This would seem to be an executory devise dependent on a contingency which did not occur.

Even if the qualifying clause should be correctly construed as a condition in restraint of alienation, it would be a condition precedent, and in such case the doctrine contended for by the defendant would have no application. Reeves on Real Property, secs. 418, 419 and 420.

The question is no longer of moment to the parties, as the opinion of the court on the plaintiffs' appeal decides that the defendant is the owner of the property. There is

No Error.

WILLIAMS v. HUGHES.

(Filed September 12, 1905).

Costs of First Trial—Judgments.

Where at the first trial of the case judgment was entered for the defendants and the plaintiff appealed and a new trial was granted, and at the second trial, the defendants again recovered and in the judgment, the plaintiff was taxed with all the costs of the defendants in the action, except the costs of appeal, *held*, the plaintiff's exception to the judgment upon the ground that he was not taxable with any of the costs of the first trial, was without merit; sections 525-6 and 540 of The Code, relating to taxation of costs, refer to a final recovery upon the merits.

ACTION by P. H. Williams, Administrator of D. L. Prichard, against Joseph H. Hughes and others, heard by *Judge B. F. Long* and a jury, at the Spring Term, 1905, of the Superior Court of CAMDEN County, upon exception to the taxation of costs.

At the first trial of the case judgment was entered for the defendants upon a verdict in their favor and plaintiff appealed. This court granted a new trial for error in the refusal of the judge to give instructions. 136 N. C., 58. At the second trial, the defendants again recovered and in the judgment the court taxed the plaintiff with all the costs of the defendants in the action, except the costs of the appeal to this court, which included the cost of the transcript and certificate. Plaintiff excepted and appealed upon the ground that he was not taxable with any of the costs of the first trial.

Pruden & Pruden and *J. Heywood Sawyer* for the plaintiff.

Aydlett & Ehringhaus for the defendants.

WILLIAMS *v.* HUGHES.

WALKER, J., after stating the facts: The contention of the plaintiff is that, as a new trial was granted in his first appeal, he cannot be taxed with any of the costs of the former trial. The matter of costs is regulated solely by the statute and the correctness of plaintiff's contention depends, therefore, upon what is its true construction, and must be determined by its meaning. By section 525 of The Code, costs are allowed, of course, to the plaintiff, upon a recovery, in cases of which a justice of the peace has no jurisdiction. This action was of that character, it being one brought for the purpose of subjecting land to the payment of intestate's debts. By section 526, costs are allowed, of course, to the defendant, unless the plaintiff be entitled to recover them. These are the general provisions of the statute relating to the taxation of costs. Sections 527 and 540 provide for the costs in appellate courts, and give the court a discretion in respect to the taxation of such costs when a new trial is ordered or the judgment of the lower court is not wholly reversed. These provisions need no special consideration in this case, as plaintiff has been allowed all the costs of his first appeal. It will be observed that by section 525 the condition precedent to the plaintiff's right to costs is that he shall recover in the action. It is perfectly clear that this recovery, in a case like the one under consideration, refers to a final determination upon the merits. The plaintiff has never "recovered" in this action in any sense. He was successful in this court to the extent of obtaining a new trial, but that by no means was equivalent to a recovery in the court below. This court merely ordered a new trial and in that state of the case neither party had "recovered" in the action and the question of costs was left open to be settled by the result of the final trial of the case. Plaintiff relies on a provision of section 540 of The Code to the effect that, if the appellant recovers judgment in the appellate court, he shall be allowed the costs of that court and such costs as he should have recovered in

the court below had the judgment of that court been correct, and he shall have restitution of any costs of the lower court which he shall have paid under its erroneous judgment. The first part of this provision manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. *Ellert v. Kelly,* 4 E. D. Smith (N. Y.), 12. The trial court cannot ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. What is said by the court in *Dobson v. Railroad,* 133 N. C., 626, and quoted by plaintiff's counsel in their brief, refers to the latter branch of section 540, relating to restitution of any costs which have been actually paid by the appellant in the court below. The hypothetical question there stated is not even now presented. We are not to decide whether, if plaintiff had paid any of the costs in the lower court, he was entitled to have the amount so paid restored to him when the new trial was ordered, but whether his liability for all of defendant's costs is to be determined by the result of the action. We think the view we have taken of the statute is sustained by the authorities. In *State v. Horne,* 119 N. C., 853, the defendant was convicted and appealed. A new trial was ordered and he was acquitted. There was an appeal by the county commissioners from so much of the judgment of the court as taxed the county with the costs of the trial in which the defendant was convicted. In passing upon the exception to the judgment, the court, by *Clark, J.,* says: "There is no exception in State cases to the rule prevailing in civil cases, that the costs follow the result of the final judgment." That case is in principle like ours. It declares the true and only test of liability for costs to be the nature of the final judgment, the party cast in the suit being the one upon whom the costs must fall. The same rule was stated and enforced in *Kincaid v. Graham,* 92 N. C., 154. The defendant claimed a credit of fifty dollars on

the debt, the subject of the action, which, if applied, would still leave a balance due the plaintiff. The sole issue in the justice's court was based upon this claim. Defendant lost in that court and appealed. He won in the appellate court, but this court held that he must nevertheless pay the costs of that court and the decision was reached by a construction of section 540, upon which plaintiff in this case relies, namely, "if the appellant shall recover judgment in the appellate court, he shall recover the cost of that court and those he ought to have recovered below, had the judgment of that court been correct." As the defendant did not recover in the action, though he succeeded upon the only issue raised in the appeal, the court held the plaintiff, in whose favor final judgment was rendered, was entitled to his costs. Indeed in *Dobson v. Railroad*, a case cited by the appellant and already referred to by us on another point, it is laid down as the rule that costs of the lower court abide the final result in that tribunal with a few exceptions not embracing our case. It may be taken as settled, therefore, by this court that no part of the costs of an action can be taxed against the party recovering judgment, save in a few exceptional instances not within the general principle which governs this case. *Wall v. Covington*, 76 N. C., 150; *Horton v. Horne*, 99 N. C., 219; *Field v. Wheeler*, 120 N. C., 264. In *Bruner v. Threadgill*, 93 N. C., 225, plaintiff's action was to redeem a mortgage by a sale of the premises, and certain disputed matters of account were referred, upon all of which decision was given in favor of defendant by the referee. Plaintiff mortgagor was held entitled to recover his costs, although a balance was found due the defendant mortgagee. To the same effect are *Patterson v. Ramsey*, 136 N. C., 561; *Wooten v. Walters*, 110 N. C., 251; *Ferrabow v. Green, ibid.*, 414. The same construction has been placed upon similar statutes in the courts of other States. In *Ellert v. Kelly*, 4 E. D. Smith (N. Y.), 12, the very point made in this case was

presented and the court held, that where judgment was reversed in the appellate court, the appellant was not entitled to any of the costs in the lower court, not relating to the appeal, without an award, in addition to the reversal of judgment for him upon the merits. The result of the case is thus stated: "There has been no final determination between the parties. It does not appear that the appellant has lost the cost (which he incurred in the court below) by reason of the erroneous judgment. *Non constat* that he would have recovered those costs if the error had not been committed. The judgment might have been against him if the errors had not occurred. The fact that errors were committed was a sufficient reason for relieving him from the judgment itself. But the reversal did not adjudge directly, nor by implication, that the defendant was not liable at all." This accords precisely with our present view of the matter and the principle settled by our former decisions. In the following cases the identical question was presented and decided in the same way, with this added observation that, if there is no judgment on the merits directed in favor of the plaintiff in error (appellant under our system of pleading and practice), but the original action, in any form, is still to go on, the costs of the court below must abide the final issue of the cause. *Gosling v. Acker,* 2 Hill, 391; *L. V. R. R. v. McFarland,* 44 N. J. Law, 674; *Byrnes v. Hoyt,* 12 Me., 458. In the case last cited the court said: "The plaintiff in error, then, by the reversal, is entitled to be restored to what he lost directly by the judgment, which he succeeded in reversing; and not to his costs in the original suit, to which he would have been entitled, if judgment had been rendered in his favor. This is the measure of relief which our law allows to a defendant aggrieved by an erroneous judgment."

The rule is stated in *Cartwright v. Sale,* 16 Ohio, 316, with special application to facts such as we have in this case. "The judgment of reversal or affirmance only embraces the

costs made under the proceeding or writ of error. In case of affirmance there has already been a judgment for the costs of the original proceeding; on reversal the costs of the original proceeding must abide the event of the suit." Where a judgment was reversed and the case remanded with an unconditional mandate for a new trial, it was held erroneous to allow appellant, afterwards, any part of the costs of the former trial. *Garrison v. Singleton*, 5 Dana (Ky.), 160. Authorities are quite abundant to the same purport. 5 Enc. Pl. & Pr., 122, and notes. Applying to the facts of our case this familiar rule, that costs follow the judgment, and are to be taxed against the defeated party, we can find no error in the judgment of the court.

We have discussed the question more at length than we would otherwise have done, because of the strenuous insistence of learned counsel that the meaning of the statute is the reverse of that we have adopted. It is proper, though, that we should remove doubts which seem to exist with some as to what costs are taxable in cases like this by declaring the rule which should govern, with a full statement of our reasons therefor, so that the practice may be clearly settled, if possible, once for all, as the question may be one of frequent recurrence.

No Error.

JENNINGS v. WHITE.

(Filed September 12, 1905).

Deeds—Descriptions—Adverse Possession—Privity of Estate—Instructions.

1. Where the call in a deed is for a certain distance to a known and fixed line of another tract, the distance will be disregarded and the line control, but the court should instruct the jury, as a question of law, what the boundaries are, leaving to them the question where they are.

2. In an action of ejectment, an instruction that if the jury should find that plaintiff and those under whom he claimed had been in the exclusive, open, continuous and adverse possession of the land in controversy from 1880 to the bringing of the action, they should answer the issue for the plaintiff, is erroneous, where the plaintiff failed to show any privity in respect to the *locus in quo* between himself and those whose possession preceded his.

3. Possessions cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute.

ACTION of ejectment by W. M. Jennings and wife against W. H. White, heard by *Judge E. B. Jones* and a jury, at the November Term, 1904, of the Superior Court of PASQUOTANK County.

From a judgment for the plaintiffs, the defendant appealed.

Aydlett & Ehringhaus for the plaintiffs.

W. M. Bond and *C. E. Thompson* for the defendant.

CONNOR, J. Plaintiff alleged that he was the owner and in possession of a lot in Elizabeth City, on Road street, beginning at the northeast corner of Scott's lot and running at

a right angle with Road street, along the fence of said Scott 410 feet to Commander's line, thence northwardly parallel with Road street about 56 feet to W. K. Carter's line, thence eastwardly with Carter's line parallel with the first line to Road street, thence with said street about 56 feet to the beginning. The defendant admitted that he was in possession of a part of said lot, denying plaintiff's alleged title thereto, and alleged that he was the owner thereof. Plaintiff introduced several deeds executed prior to October, 1876, which defendant conceded covered the lot described in the complaint. Plaintiff introduced a deed from G. F. Steel to Sarah Gaskins, bearing date October 16, 1876, conveying a lot "beginning on Road street at the northeast corner of Charles' lot, running thence with said street 56 feet to the colored Odd Fellow's lot at a large elm tree, thence north 82½ degrees, west 410 feet to Thomas Commander's line, thence south 4 degrees west 18 feet to W. F. Martin's line, thence south 82½ degrees east along Martin's and Mrs. Dashiell's line 115 feet, thence south 11 degrees east 38½ feet to said Dashiell's line, thence along her line and Charles' line south 82½ degrees east 295 feet to the beginning. A deed from Sarah Gaskins to G. W. Cobb, dated September 1, 1887, conveying, by the same description, the lot conveyed to her. Cobb conveyed by the same description to plaintiff July 8, 1889. It is contended by defendant that, for some reason, Steel, who it is conceded was the owner of the parallelogram described in the complaint, in conveying to Sarah Gaskins retained the southwestern corner of the lot. The plaintiff says that while it is true that the third call is "south 4 degrees west 18 feet" it is also to "Col. W. F. Martin's line," and that the last part of the call will control, by invoking the well settled principle that where the call is for a certain distance to a natural object or a known and fixed line of another tract, the distance will be disregarded and the natural object or line control. This principle is conceded.

The court was not requested to instruct the jury upon this view. His Honor simply told the jury to inquire whether the deed under which plaintiff claimed covered the land in dispute. The court should instruct the jury, as a question of law, what the boundaries are, leaving to them the question, where they are; under the description contained in the plaintiff's deed and those of Gaskins and Cobb, the third call could not exceed 18 feet unless the jury fixed "Col. W. F. Martin's line" at some other point, in which event they would extend the call to such line. His Honor inadvertently omitted to give the jury any guide by which they could be governed in answering the question submitted to them. No special instructions were asked and it may be that defendant is not in a position to avail himself of the failure to so instruct the jury. If the grantor in the deed to Sarah Gaskins intended to make the third line 56 feet instead of 18, he has made a break in the side line running into another lot 38 feet, which would prevent him from reaching the beginning point by the calls in the deed at the end of the line of 295 feet. It would seem difficult to reconcile the calls in the deed from Steel to Gaskins and those leading up to and including plaintiff's deed, so as to include all of the original lot, being a parallelogram, with two sides of 410 feet and two ends of 56 feet each. The plaintiff, however, contends that if it be conceded that the deeds under which he claims do not cover the *locus in quo,* that he and those under whom he claims have been in possession of the disputed portion for more than twenty years and have thereby acquired title. There is evidence tending to show that the original lot was enclosed by a fence and that it continued so until changed by defendant, who purchased the adjoining lot during the year 1903, and that the successive owners of the original lot occupied the *locus in quo.* His Honor instructed the jury that if they should find that plaintiff and those under whom he claimed had been in the exclusive, open, continuous and adverse possession of the

land in controversy up to the said fence and that the possession had been continuous from 1880 to the bringing of the action, they should answer the issue for the plaintiff. Defendant excepted.

The difficulty which the plaintiff encounters in sustaining this instruction is found in his failure to show any privity in respect to the *locus in quo* between himself and those whose possession preceded his. If the deed under which plaintiff claims had covered the disputed land, although his grantor may have had no title he could have tacked his possession with that of his grantor and built up title based upon a disseisin by his grantor. It cannot be that several disseisins having no privity can be tacked so as to vest title. The law in this respect is thus stated in 1 Cyc., 1007: "The general rule is that possessions cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. It must clearly appear in the deed that the particular premises were embraced in the deed or transfer in whatever form it may have been made." Of course if it be shown that there was a mistake in the deed, a different principle applies.

"To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate, their several consecutive possessions cannot be tacked so as to make a continuity of disseisin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several

successive disseisors. To create such privity there must have existed as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or devisor and devisee. In such cases the title acquired by disseisin passes by descent, deed or devise. But if there is no such privity, upon the determination of the possession of each disseisor the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor." *Sawyer v. Kendall,* 64 Mass., 241; *Hollingsworth v. Shearman,* 81 Va., 681; *Sherin v. Brackett,* 3 Minn., 152; *Ward v. Bartholomew,* 23 Mass. (6 Pick.), 409; *Humes v. Bernstein,* 72 Ala., 546; *Atwell v. Shook,* 133 N. C., 387. It does not very clearly appear in what manner Steel delivered the possession to Sarah Gaskins in 1876. If he put her in possession of the entire lot including the portion not included in the deed, she in respect to such portion, became his tenant at will. She certainly acquired no title to the portion not included in the deed—nor was there in that view of the case any disseisin. There is evidence on the part of the witness, Raper, that Mrs. Gaskins was in possession in 1880. If such possession was permissive the statute did not run. If it was adverse to Steel in whom the title remained, as we have seen it did not enure to the benefit of her grantee or the subsequent grantee, because it was not covered by any of the deeds made subsequent to the one from Steel to Gaskins. This court held in *Blackstock v. Cole,* 51 N. C., 560, that the mere fact that one who had purchased a tract of land went into possession of another adjoining tract not covered by the deed is no evidence that he claimed such tract under the person from whom he purchased. In *Bryan v. Spivey,* 109 N. C., 67, cited by counsel for plaintiff, the plaintiff, by showing that possession of the land in controversy had been held for more than thirty years, availed himself of the presumption that a grant had issued from the

State. To do this it was not necessary to show any connection between the successive occupants. See cases cited by *Shepherd, C. J.,* who says: "If the title was out of the State, the law would also presume that a deed had been executed by the true owner to the parties under whom the plaintiff claims, they having had continuous adverse possession of the same succeeding each other *as privies* for twenty years." The original possession being shown in Richard Dobbs Speight a continuous possession in those succeeding as his heirs at law was shown. The distinction between that case and the one before us is obvious. The same is true of *Alexander v. Gibbon,* 118 N. C., 796. The title was directly put in issue and the burden was upon the plaintiff to show title in himself. We are unable to say whether the jury were of opinion that the "Col. W. F. Martin line" was established and that disregarding the distance called for in the third call the plaintiff's deed and those to Gaskins and Cobb covered the disputed land or whether they were controlled by the contention that the plaintiff had acquired title by adverse possession upon the principle laid down by His Honor. For the reasons given, we are of the opinion that the charge in that respect was erroneous and for this the defendant is entitled to a

New Trial.

JOHNSON v. WESCOTT.

(Filed September 12, 1905).

Entry of Vacant Lands—Admissions.

1. Where, in proceedings under the laws relating to entry of vacant lands, it was admitted by the plaintiffs (protestants) that they could not show possession of any part of the land except during the years 1874-1876, nor any paper writing to any person for any part of the land covered by said entry, except three deeds which failed to connect the plaintiffs in any way with the land, the court properly dismissed the proceedings.

PROCEEDING under entry laws heard before *Judge G. W. Ward,* at the Spring Term, 1905, of the Superior Court of DARE. From the judgment entered dismissing the proceeding, the protesting parties, the plaintiffs, appealed.

B. G. Crisp for the plaintiffs.
W. M. Bond for the defendant.

BROWN, J. These proceedings were instituted under chapter 272 of the Acts of 1903, amending the laws relating to the entry of vacant lands. The protesting parties moved the court that on the face of the record, the burden of proof was on defendant (Wescott) to open the case and show cause why his entry should not be declared void. Overruled and plaintiff excepted. This was the first exception. This motion was based upon the wording of section 3 of the act. It is plaintiff's contention that under the wording of this law, the burden is on the one making an entry of land under it, when protest is filed, to at least make out a *prima facie* case that the land is subject to entry and that he has complied with the requirements of law in laying it. The plaintiffs further contend that if an individual is permitted to lay an entry and rest on his oars with no other proof than his entry,

no better field for speculation can be imagined, and that by shifting the burden on the occupant or owner in many instances he could by this technicality become possessed of lands to which the title is now considered settled. The plaintiffs contend it was doubtless with this in view that the Legislature requires the enterer to come into court and "show cause why his entry shall not be considered inoperative and void."

The argument is interesting to us, but the court is of opinion that it is not necessary to decide that question on this appeal, so we forbear giving a decision upon it.

Unfortunately for the plaintiffs they admit enough upon the face of the record to put them out of court. "It was admitted by the plaintiffs that they could not show any paper writing to any person for any part of the land covered by said entry except the three deeds or papers referred to above, nor any possession of any part of the land by any person except during the years 1874 to 1876 and no further." The record gives the dates of the three deeds and names of the parties. They fail so far as the record discloses to connect plaintiffs in any way with the land. This admission appearing in the record in the Superior Court, His Honor very properly dismissed the protesting proceedings at the cost of protestants.

Affirmed.

BOARD OF EDUCATION v. MAKELY.

(Filed September 12, 1905).

Action to Remove Cloud on Title—Swamp Lands—Burden of the Issue—Burden of Proof—Harmless Error—Instructions.

1. An exception to the admission of evidence which, if irrelevant, was harmless, is without merit.

2. In an action brought by plaintiffs for the purpose of having vacated and cancelled a grant issued to the defendant upon the ground that the land was not the subject of entry and grant as it was swamp land and was vested in the plaintiffs under section 2506 of the Code, an instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is swamp land before they could find for the plaintiffs, was proper, though the plaintiffs were in possession of the land when the suit was commenced.

3. The distinction between the burden of the issue and the burden of proof is that the burden of the issue, that is the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again.

4. Where a party requests the court to charge the jury that if they believe the evidence they should answer the issue in his favor, the adverse party is entitled to have the evidence considered most strongly in his favor and all facts which it reasonably tends to prove for him must be considered established, and any part of the evidence which tends to disprove the contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit, and where the evidence on the issue was not all one way, the instruction was not a proper one.

ACTION by State Board of Education and another against M. Makely, heard by *Judge William A. Hoke* and a jury,

at the May Term, 1904, of the Superior Court of HYDE County. From a judgment for the defendant, the plaintiffs appealed.

This suit was brought for the purpose of having vacated and cancelled a grant issued by the State to the defendant in 1888 for 176½ acres of land, upon the ground that the land was not the subject of entry and grant, as it was swamp land and was vested in the plaintiff, the State Board of Education, who had conveyed the same to its co-plaintiff, The Alleghany Company, and therefore the grant was a cloud on the title of said company. Issues were submitted to the jury which, with the answers thereto, are as follows: 1. Are plaintiffs the owners and in possession of the land set out and described in the complaint and referred to in the answer as the land contained in an alleged grant to defendant? 2. Does defendant wrongfully assert title to said land under a grant from the State, of date 1888, thereby putting a cloud on plaintiff's title? 3. Is the defendant the owner and in possession of said land? Yes. 4. Do plaintiffs wrongfully assert title to said land under the deeds exhibited from Clark to Brooks and Leach, and from Scranton Company to Alleghany Company, thereby putting a cloud on defendant's title, and also under deed from State Board of Education to Alleghany Company? Yes.

Plaintiffs opened the case and introduced much evidence tending to show that the land in controversy is swamp land, and some of the defendant's witnesses testified to the same effect. Charles Polson, one of plaintiffs' witnesses, testified that it was low boggy swamp, covered with water moss, and in order to contradict him, and also perhaps to show that it was not swamp land, the defendant's counsel was permitted on cross-examination to ask the witness if the land in dispute was not naturally drained through the Bishop tract, which lay between it and the creek and which is high and dry land and cultivated as a farm. The answer of the witness tended to

show that the Bishop land adjoined the tract described in the complaint and lay between it and Broad Creek and that a ridge of that tract is under cultivation; that it is high land and tillable, and only that part of it is dry and used as a farm, and the ridge is the only part that could be cultivated. The other facts are stated in the opinion.

Small & McLean and *Rodman & Rodman* for the plaintiffs.

W. M. Bond for the defendant.

WALKER, J., after stating the facts: Whether it was not relevant for defendant to show by the witness, Polson, the general topography of the country immediately surrounding the tract in dispute or the conformation of contiguous tracts, as bearing upon the character of the tract in question, and whether this evidence is of the same class as that excluded in *Warren v. Makely,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 365, and *Waters v. Roberts,* 89 N. C., 145, where a comparison was attempted to be made between the tract in suit and other adjoining tracts for the purpose of determining the value of the former, we need not decide, as it is quite sufficient to hold, as we do, that if the evidence was irrelevant it was harmless. Indeed all the advantage of the answer to the question was with the plaintiffs. It is apparent from the form of the question, the defendant's counsel was attempting to prove that the natural drainage of the land in dispute was over the Bishop tract, as plaintiffs' own witness, J. H. Wahab, had previously testified. But defendant's counsel got, as an answer to his question, not only what he did not want or expect, but something quite the reverse of it, and therefore the evidence made in favor of the plaintiffs. Besides, it would seem relevant to the issue to show that the Bishop tract lay between this land and the creek, the natural outlet for the drainage of lands in the vicinity, and that on

it there was arable land or a farm. It may not have been conclusive or even strong evidence as to the true character of the land in dispute, but as a circumstance it perhaps constituted some evidence tending to show that it was not swamp land. We put our decision, however, on the ground that the evidence was harmless and overrule the exception.

The plaintiffs assign as error His Honor's instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is "swamp land," before they could find for the plaintiffs, thereby placing the "burden of proof" upon them. We think this was a proper instruction, under the pleadings and the facts of this case. Plaintiffs allege that they are the owners of this tract because it is swamp land. The Board of Education (as successor to the President and Directors of the Literary Fund, Const., Art. IX., sec. 10; Code, sec. 2506), could not establish any right or title to the land by virtue of the statute, (Rev. Code, sec. 66; Const., Art. IX., sec. 10; Code, sec. 2506), investing it with the title to the "swamp lands" in the State as a part of the trust property to be held by it for the benefit of education, unless it could show that the lands claimed by it were of that description. Could a plaintiff resting his right to the title or possession of land on a deed conveying, or a will devising, to him the swamp land in a certain larger tract described therein, recover any part of the land without showing that it comes within the particular description of the deed or will? The Board does not acquire title, by virtue of the statute, to all of the lands of the State, but only to its "swamp lands."

It is alleged in the complaint and virtually admitted in the answer that the plaintiff, the Alleghany Company, is in possession of the land claiming under a deed from the Board of Education, who asserted title to the land, under the statute, as swamp land. Assuming that this possession is presumed to be rightful and is sufficient, generally, to present a

prima facie case, and to compel the defendant "to go forward" with his proof or take the risk of an adverse verdict of the jury, or an adverse ruling of the court as to the law, we yet think as the plaintiffs further allege that they derived title to the land under the statute, by reason of the fact that it is swamp land and in no other way, they should be required to take the burden of establishing this fact, so essential to the successful maintenance of their suit. This is not an action to recover the realty, but is brought for the avowed purpose of removing a cloud from the plaintiffs' alleged title and for that purpose to have vacated and cancelled the grant issued by the State to the defendant. Plaintiffs are therefore, as we have said, the actors, and they allege the affirmative of the issue to be the truth of the matter. *McCormick v. Monroe,* 46 N. C., 13. The mere fact that plaintiffs had possession of the land when the suit was commenced does not materially affect the question under discussion. The burden of the issue was upon them from the beginning to the close of the case, although the burden of proof may have shifted during the trial from one side to the other and even repeatedly back and forth. The distinction between the burden of the issue and the burden of proof is thus stated by an eminent law writer: "The burden of the issue, that is the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second

party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." 1 Elliott on Ev., 139. In the next section (140), Judge Elliott illustrates the doctrine by putting the very case we have here, and citing *Fitzgerald v. Goff*, 99 Ind., 28, in which it appeared that the plaintiff below (defendant in error or appellee), Eliza Goff, brought the suit for the purpose of removing a cloud from her title, alleging that she was the owner of the premises under a good and perfect title, but that the defendant claimed an interest and estate therein adverse to hers and praying that they be compelled to show it and that the same be declared void. Defendant Fitzgerald answered, admitting that Eliza Goff once had the title, but alleging, by cross-bill, that she had conveyed it by deed to defendant's assignor and praying that the title so acquired be quieted. Plaintiff Goff, in her answer to the cross-bill, denied the execution of the deed, and the issue tried was whether the deed had been executed. It was held that the burden of the issue was on the defendant, the cross-complainant, throughout the trial, as he was the actor and alleged the affirmative and as the form of the issue so placed the burden. That is in effect and in principle our case, although the position of the parties on the record is reversed, which, however, can make no practical difference. It was also held in that case that the *prima facie* case made by the defendant, by the introduction of proof as to the execution of the deed which authorized it to be read as evidence, did not change the burden of the issue, though it may have affected the burden of proof. In our case the defendant denies the plaintiffs' assertion of title and it therefore was incumbent upon the plaintiff to establish it by a preponderance of evidence for the reasons al-

ready given. A full discussion of the subject will be found in 4 Wigmore on Evidence, ch. 36, secs. 2486, 2488 and 2489, having special reference to the point under discussion. While he says that there is no general solvent for all cases and no one principle, which affords a sure and universal test for determining where the burden rests, which in a general sense must be decided by the nature of the pleadings and form of the issue and the facts peculiar to the case in hand, yet he further says that what he calls the first burden of proof or risk of non-persuasion of the jury rests upon the party, who must, by proving the essential fact involved, ultimately establish the issue in order to succeed in the action. 4 Wigmore on Ev., secs. 2488 and 2489. It may be added that the defendant, who is not the actor, relies upon a State grant regularly issued, and the presumption must be that it passed a good title to the grantee until the contrary is shown. It comes from the sovereign, the origin and source of all titles in this State, and conveyed at least a *prima facie* title, nothing else appearing. *Holloran v. Meisel,* 87 Va., 398; *Clay v. White,* 1 Munf., 162; *Wool v. Saunders,* 108 N. C., 729. We do not mean to say that a grant cannot be attacked collaterally in ejectment, nor directly in a proceeding to have it vacated, upon the ground that the lands described in it were not "vacant or unappropriated" at the time it issued, but when a person asserts its invalidity by reason of that fact and asks that it be vacated, claiming the land by virtue of a special grant or donation confining the bounty to lands of a special description, such as "swamp or unappropriated lands," it is incumbent on the donee to show that his grant or donation is for land within the particular description. *Stanmire v. Powell,* 35 N. C., 312. Indeed, in actions of ejectment, it has been said that the fact the lands are not vacant or unappropriated "may be shown," which clearly implies that the proof must come from the party impeaching the grant, *Lovinggood v. Burgess,* 44 N. C., 407; *Strother*

v. Cathey, 5 N. C., at p. 164; *Stanmire v. Powell, supra,* for the court could hardly have referred to the burden or duty of "showing" as being upon the grantee, when the fact if shown, would invalidate his own title. It is not necessary in this connection to discuss the difference between a case where the grant can be assailed collaterally in ejectment, because the land was not vacant at the time it issued, and the court merely declares that it transfers no title (*University v. Sawyer,* 1 N. C., 159; Taylor, 114), and one where it can be attacked only by a direct proceeding, formerly *scire facias* or suit in equity, if any defects or irregularities in the preliminary proceedings or other sufficient and like ground is alleged. *Stanmire v. Taylor,* 48 N. C., 210. It is enough to declare that the plaintiffs having alleged title in themselves and that defendant's grant is a cloud upon it because, on account of some extrinsic fact, it is void, they must show it, and the ruling of His Honor in this respect was right.

The last objection of the plaintiffs is equally untenable. They requested the court to charge the jury that if they believed the evidence they should answer the issues "yes" or in favor of the plaintiffs. The evidence as to the character of the land was not all one way. When such an instruction is requested, the adverse party is entitled to have the evidence considered most strongly in his favor and all facts which it reasonably tends to prove for him must be considered as established, and any part of the evidence which tends to disprove the plaintiffs' contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit. The testimony of Makely, Manning, Bishop and Spencer, especially that of the last named witness, tended to show that the land was not of that kind generally called and known as swamp land. The instruction therefore was not a proper one. It is unnecessary to decide whether the Act of 1891, ch. 302, applies to the defendant's grant which was issued prior to its passage, as plaintiffs' counsel conceded that the court

had charged the jury in accordance with the provisions of that act. The provisions of section 2527 of The Code did not apply to the case unless the plaintiffs showed that the land was a swamp, for the section refers only to that kind of land. His Honor charged correctly in regard to the presumption created by that section of The Code, and we can discover no error in the remaining portions of the charge to which the plaintiffs' other exceptions were taken. They are covered by what has already been said and require no separate discussion, except the one relating to the manner of answering the issues. This depended, as His Honor told the jury, upon how they should answer the first issue. If they found that the land was swamp land, when the grant was taken out, and consequently answered the first issue "yes," it followed logically that they should answer the other issues in favor of the plaintiffs, but if they found the other way and answered the first issue "no," they should for the same reason answer the other issues, as they did, in favor of the defendant, and the court so instructed them. The charge was very full and clear and the law applicable to the different aspects of the case was in every particular correctly stated.

No Error.

HOKE, J., did not sit on the hearing of this appeal.

WILKINS v. NORMAN.

(Filed September 12, 1905).

Deeds—Repugnant Clauses—Rules of Construction.

1. Where the entire estate in fee simple, in unmistakable terms, is given the grantee both in the premises and the *habendum*, and the warranty is in harmony with the preceding parts of the deed, but following the warranty there is introduced two entirely new clauses, both repugnant to the estate conveyed, *held*, that the repugnant clauses are void.

2. Where there are repugnant clauses in a deed, the first will control and the last be rejected.

3. While the general rule is that the court will by an examination of the entire deed, seek and if found, effectuate the intention of the grantor, we must keep in mind the other rule that when rules of construction have been settled, it is the duty of the court to enforce them, otherwise titles are rendered uncertain and insecure.

ACTION by L. Wilkins and others against Anna Norman, heard by *Judge G. W. Ward*, upon the pleadings and agreed facts, at the July Special Term of the Superior Court of WASHINGTON County.

Benj. Phelps on October 2, 1872, executed a deed conveying the land in controversy to Berrick Norman. Following the recital of the consideration, etc., the deed contains the usual operative words of conveyance, "unto the said Berrick Norman, to him and his heirs and assigns forever," etc., etc. To have and to hold the said land and premises above described * * * to him the said Berrick Norman, to him, his heirs and assigns free, and discharged of any and all incumbrances in fee simple forever." Following the usual covenant of warranty are the words "and after the death of Berrick Norman and Moseller Norman, his wife, the lands and premises to descend to their heirs, Lad Wilkins,

Ellick Wilkins and Susan Norman, and to be equally divided tween the three heirs above mentioned." Berrick Norman and his wife, named in the deed, are dead. The plaintiffs are the same persons named in the last clause of the deed. The defendant is in possession. His Honor, upon the foregoing facts, was of opinion that plaintiffs were not entitled to recover and rendered judgment accordingly. Plaintiffs appealed.

A. O. Gaylord for the plaintiffs.
H. S. Ward for the defendant.

CONNOR, J., after stating the case: We concur with His Honor. The entire estate, in unmistakable terms, is given the grantee both in the premises and the *habendum*. The warranty is in harmony with the preceding parts of the deed; following the warranty there is introduced two entirely new clauses, both repugnant to the estate and interest conveyed. It is sought to make the wife of the grantee a tenant in common and limit the estate to the life of the grantee and his said wife and the survivor, giving, by way of remainder, the fee which had already been conveyed to the grantee, to the plaintiffs. The principle upon which such repugnant clauses in deeds has been disposed of by this court, following the most approved text writers, is thus stated by *Daniel, J.*, in *Hafner v. Irwin*, 20 N. C., 570: "In the case before us the whole interest in the property is granted and conveyed to the plaintiff in the premises of the deed. The same interest being afterwards limited in the *habendum* to Curry makes that part of the deed repugnant to the premises and therefore void."

That case was cited with approval by *Faircloth, C. J.*, in *Blackwell v. Blackwell*, 124 N. C., 269, saying: "In the premises, the fee is conveyed to the plaintiff, and afterwards a life estate to the defendant in the same lands. If the first

intent, expressed in apt language, and repeated in the warranty clause, is to be observed, then there is nothing left to satisfy the intent in the last clause." It is an elementary maxim that when there are repugnant clauses in a deed, the the first will control and the last be rejected. In the case of *Blair v. Osborne,* 84 N. C., 417, it will be noted that the introduction of the children in the *habendum* did not affect the estate or interest conveyed in the premises. *Judge Ashe* says that it is clear that the mother, grantee, took only a life estate by the language in the premises. It was sought to so construe the *habendum* that the children, introduced for the first time, should be adjudged tenants in common with her. This the court declined to do, but permitted the children to take in remainder after the expiration of the mother's life estate. In our case the plaintiffs can take only by rejecting the words of inheritance in the premises and *habendum,* thus cutting down the estate of the grantee from a fee simple to a life estate. The authorities are uniform that this cannot be done. The learned counsel for the plaintiff cites *Rowland v. Rowland,* 93 N. C., 214. In his well considered opinion, *Mr. Justice Ashe* puts our case, saying: "Blackstone, in his Commentaries, vol. 2, p. 298, has said that the office of the *habendum* is to lessen, enlarge, explain or qualify the premises, but not to contradict or be repugnant to the estate granted in the premises. And to illustrate what is meant by the repugnancy which will render the *habendum* nugatory, he puts the case where, in the premises the estate is given to one and his heirs, *habendum* to him for life, for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away and divested by it." The deed in that case upon which the decision is based is essentially different from ours. We have considered the case upon the assumption that the clause under which plaintiffs claim contains apt words to convey an estate in remainder. This, however, is by no means clear. While we are advertent to the

general rule that the court will by an examination of the entire deed, seek, and, if found, effectuate the intention of the grantor, we must keep in view the other rule that when rules of construction have been settled, it is the duty of the court to enforce them, otherwise titles are rendered uncertain and insecure. *Merrimon, J.,* in *Leathers v. Gray,* 101 N. C., 162, gives expression to the principle and the reason upon which it is based. "When a testator employs words and phrases to express his intention in the disposition of his property, by will, that have a well known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall, in some appropriate way, to some extent, to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of such words bring his attention so expressed, within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator. Otherwise technical words would have no certain meaning or effect, and the rule of law would be subverted in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect and so it must, but the real intention recognized and enforced by the law, is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it."

The judgment must be affirmed.

Affirmed.

HINTON v. MOORE.

(Filed September 12, 1905).

Ejectment—Descriptions in Deeds—Parol Evidence—Connor Act—Unregistered Lost Deeds—Purchasers for Value.

1. In an action of ejectment, the plaintiff who has an equitable interest in the property can recover against a wrongdoer.

2. A deed from a trustee which not only refers to the deed of trust as containing the land the trustee sold, but goes on with a fuller description, as follows: "A tract of land up the Mill Pond Road of 60 acres more or less, being all said W owned adjoining R and others' lands," is sufficient to permit parol evidence in aid of the description.

3. The Connor Act (Laws 1887, chapter 47,) applies both to lost and unlost deeds executed after December 1, 1885, and there was no error in rejecting parol evidence to show that plaintiff's grantor deeded the land in controversy to W in 1891 and that said deed had been lost before registration, where plaintiff was a purchaser for value of said title under registered conveyances.

ACTION of ejectment by John L. Hinton against Acom Moore, heard by *Judge B. F. Long* and a jury, at the March Term, 1905, of the Superior Court of PASQUOTANK County.

The ordinary issues in ejectment were submitted. Evidence was introduced by the plaintiff tending to establish his claim. The defendant offered no testimony.

The court charged the jury that the affirmative of all the issues was on the plaintiff and he must satisfy the jury by the greater weight of the testimony as to his allegations on each and all of the issues, and that if the jury believed the evidence they should answer the first and second issues "yes." The defendant in apt time excepted, and noted other exceptions on the trial to which reference will be made. There

was a verdict for the plaintiff and from the judgment thereon the defendant appealed.

Pruden & Pruden and *Shepherd & Shepherd* for the plaintiff.

Aydlett & Ehringhaus for the defendant.

HOKE, J., after stating the case: There was evidence to the effect that the title to the land in dispute was in one J. L. Williams. The plaintiff claimed to derive his title from said Williams in two ways: First (a) deed of trust from J. L. Williams to C. Guirkin, dated February 23, 1887; (b) deed from M. L. Guirkin, administratrix of C. Guirkin, dated October 2, 1889, recorded March 11, 1904. Second, (a) deed of trust from J. L. Williams to C. L. Hinton, dated October 30, 1897; (b) deed from C. L. Hinton to the plaintiff, dated October 22, 1899, recorded January 15, 1901. This action was commenced September 2, 1903.

It is not necessary to pass upon the objections made by defendant to the first line of deeds offered and relied upon by plaintiff, because, in the opinion of the court, the plaintiff has made out his case under and by virtue of the deed from the trustee, C. L. Hinton, bearing date October 22, 1899, and duly registered January 15, 1901.

If, as defendant contends, there has been no proper foreclosure of the Guirkin deed of trust, then the deed from C. L. Hinton, trustee, if valid, would convey to plaintiff an equitable interest in the property which would give him the right to recover against a wrong doer. *Murray v. Blackledge,* 71 N. C., 492; *Arrington v. Arrington,* 114 N. C., 116; *Watkins v. Manufacturing Co.,* 131 N. C., 536.

Defendant contends that the deed from C. L. Hinton, trustee, is defective because the description is too vague and indefinite to permit the introduction of parol testimony to identify the property, and objected to the introduction of

the deed on that account, and the evidence offered and admitted in aid of the deed.

The court is of opinion that the objection is not well taken. The deed from the original owner, J. L. Williams, to C. L. Hinton, trustee, describes the land as 66 acres of land, more or less, lying on Mill Pond Road, and being the same set over to him (J. L. Williams) in the division of his father's land.

The partition proceedings of his father's land shows lot No. 3 awarded to J. L. Williams and contains a plat of this lot of land, giving proper metes and bounds. The description in this deed is complete.

The deed from C. L. Hinton, trustee, not only refers to the deed of trust as containing the land the trustee sold, but goes on with a fuller description as follows: "A tract of land up the Mill Pond Road of 60 acres, more or less, being all said J. L. Williams owned adjoining Ivey Roach and others' lands." The language of the deed was such as to permit parol evidence in aid of the description and the evidence offered was sufficient, if believed, to identify the property. *Perry v. Scott,* 109 N. C., 374; *Wilkins v. Jones,* 119 N. C., 96; *Sherman v. Simpson,* 121 N. C., 129.

Defendant further offered parol evidence to show that J. L. Williams, under whom plaintiff claimed, conveyed the land in controversy to one T. J. Williams by deed bearing date 1891; that said deed had been lost before registration, and had never been registered.

On objection, this evidence was excluded and defendant excepted. There is neither allegation, claim nor evidence tending to connect defendant with this alleged lost deed, and the evidence, if competent, must be so declared on the ground that the same tends to show that J. L. Williams, under whom plaintiff claims, had no title at the time he attempted to convey same to C. L. Hinton, trustee.

Under our present registration law, chapter 47, Laws

1885, registration is not necessary to the validity of a deed for valuable consideration, effective under the Statute of Uses, as between the parties. (In cases where livery of seisin was formerly required, registration still supplies the place of that ceremony. Act 1885, chapter 47, section 3).

The registration law, chapter 147, Laws 1885, commonly known as the Connor Act, expressly repeals section 1275 of The Code, and provides that no conveyance of land, etc., shall be valid to pass property as against creditors or purchasers for valuable consideration, etc., but from the registration. The act simply applies to deeds after a certain date, the law which then existed as to mortgages and deeds of trust being section 1254 of The Code.

If plaintiff was claiming the land otherwise than as a creditor or purchaser for valuable consideration, the position taken by defendant could be sustained and the ruling of His Honor in rejecting the proposed evidence would be erroneous.

The alleged lost deed, however, has never been registered. The plaintiff is a purchaser of the title of James L. Williams, under registered conveyances and for valuable consideration, and by the very terms of the registration act the lost deed could not avail to defeat plaintiff's title even if established. The proposed evidence was therefore immaterial and there was no error in rejecting it.

The court is referred to the case of *Jennings v. Reeves,* 101 N. C., 447, as authority against the position here declared. In *Jennings v. Reeves* both the language of the head note and of the opinion would seem to permit the interpretation claimed for them by defendant, but the facts of the case show that the unregistered lost deed which was there upheld bore date in 1860, and by one of the provisos of the Connor Act, that act, under certain circumstances, was not to apply to deeds bearing date prior to December 1, 1885.

The decision in *Jennings v. Reeves* was no doubt made on

the facts of that case as applied to deeds executed prior to the date stated, and will not sustain defendant in the case we are now considering. In the present case all of the deeds relevant to this controversy are dated since December 1, 1885. They are governed by the express and direct regulations in the body of the Connor Act, and the terms of the provisos in no way affect them.

If, however, the interpretation put upon the authority cited by defendant be the true one, the court would not hesitate to declare that the case in this respect is not well decided.

It would go far to destroy the beneficent effects contemplated and resulting from the Connor Act to establish as a general principle the exception that said act did not apply to lost deeds. No doubt, if a claimant should lose his deed before registration, he might protect his title by action properly commenced and filing notice of *lis pendens*. But under all ordinary circumstances, and in the absence of some such procedure as suggested, the registration laws will apply both to lost and unlost deeds executed after the date stated, December 1, 1885.

The alleged lost deed, therefore, would not avail the defendant if it were established because same had never been registered, and there was no error in rejecting the evidence offered on that question.

There is no error, and the judgment must be

Affirmed.

JOYNER v. EARLY.

(Filed September 12, 1905).

Claim and Delivery—Amendments—Deceit and False Warranty.

1. In an action for the possession of a mule, it was in the discretion of the court to allow the plaintiff to amend his complaint, which alleged simply ownership and wrongful detention, by setting out allegations of fraud and deceit on the part of the defendant in obtaining possession of the mule in a trade, such amendment being in no sense the introduction of a new cause of action.

2. Where the defendant obtained possession of a mule in a trade with the plaintiff by false, fraudulent and deceitful representations, the plaintiff may sue for damages for the false warranty, or repudiate the trade and sue to recover the specific property.

3. The declarations of a third person to the defendant were properly excluded, where the record shows that the plaintiff was not present.

ACTION to recover possession of a mule, heard before *Judge E. B. Jones* and a jury, at the Spring Term, 1905, of the Superior Court of HERTFORD County. From a judgment for plaintiff, the defendant appealed.

Winborne & Lawrence for the plaintiff.
Francis D. Winston and *John E. Vann* for the defendant.

BROWN, J. The plaintiff sued out claim and delivery proceedings for the mule and filed the ordinary complaint alleging simply ownership upon the part of the plaintiff and wrongful detention by the defendant. On the trial the plaintiff offered evidence tending to prove that the defendant obtained posession of the mule in a trade with the plaintiff by false, fraudulent and deceitful representations. At the conclusion of the plaintiff's evidence the defendant moved to

nonsuit. The court denied the motion and permitted the plaintiff to amend his complaint by setting out the allegations of fraud, misrepresentation and deceit upon the payment of costs "and the trial proceeded without objection by the defendant."

In his brief the defendant reviews the ruling of the court. Waiving the fact that the defendant did not except to the allowance of the amendment, we sustain the ruling of the judge below. It was in no sense the introduction of a new cause of action, nor is it prohibited in *Ely v. Early*, 94 N. C., 1. The mule was the property in controversy. The amended complaint simply set out in full the allegations of fraud and deceit.

Under the facts testified to by the plaintiff, he had the right to sue for damages for the alleged false warranty, or repudiate the trade and sue to recover the specific property. This is well settled. *DesFarges v. Pugh*, 93 N. C., 31; *Wilson v. White*, 80 N. C., 280; *Wallace v. Cohen*, 111 N. C., 103; Bishop on Contracts, section 667; Benjamin on Sales, section 656 and note; *Donaldson v. Farwell*, 93 U. S., 631; *Blake v. Blackley*, 109 N. C., 262.

The allowance of this amendment was a matter in the sound discretion of the court and not reviewable.

In his brief the defendant's third exception states that "the court refused to allow the defendant to testify to a conversation had with him and the plaintiff by one Sessoms." The record shows that the plaintiff was not present. The declarations of Sessoms to the defendant were properly excluded. We have examined the other exceptions and fail to find that the court below erred in any particular.

Affirmed.

MOORE v. FOWLE.

(Filed September 12, 1905).

Injunctions Against Cutting Timber—Act 1901, Chapter 666—Descriptions in Deeds—Practice at Injunctive Hearings.

1. The Act of 1901, chapter 666, is not a limitation upon the power of the courts to continue injunctions until the controversy can be decided by court and jury, but was intended to preserve the timber upon lands in litigation pending the suit and throws greater safeguards around the rights of litigants, and when the plaintiff satisfies the judge that his claim is *bona fide* and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined.

2. A deed purporting to convey land "lying and being on the south side of Pamlico river and the south side of Blount's creek, containing 75 acres, be the same more or less, it being the same land Jas. Peele conveyed to Hiram Edgerton by deed, which deed will more fully show courses and distances, reference being had to the said deed, and deeded by the said Hiram Edgerton to William E. Shaw," is not void for uncertainty of description, as the deeds referred to can be offered in evidence on the trial and the land probably be located.

3. On hearings for injunctions the title is not required to be proved with that strictness and certainty of proof as upon the trial.

4. Description by name, where lands have a known name, is sufficient and a tract of land can be then located by its name.

ACTION by M. Moore and others against S. R. Fowle and others to recover damages for cutting timber upon land, now pending in the Superior Court of BEAUFORT County. His Honor, *Judge G. W. Ward,* granted a restraining order enjoining the defendants from cutting timber upon the land, and on the hearing continued the injunction. From this order, the defendants appealed.

Nicholson & Daniel for the plaintiffs.
Small & McLean and *A. O. Gaylord* for the defendants.

BROWN, J. It is contended by the defendants that the evidence offered by the plaintiffs did not show a *bona fide* claim based upon evidence sufficient to constitute a *prima facie* title in accordance with the terms of the statute (Acts 1901, chapter 666), and therefore the injunction should have been dissolved. We have examined all the affidavits and deeds set out in the record and have concluded that His Honor properly continued the injunction.

The Act of 1901 is not a limitation upon the power of the courts to continue injunctions until the controversy can be tried by court and jury. Section 1 specifies certain conditions when the injunction shall not be dissolved and when the court shall not permit the timber to be cut except by consent. Section 2 specifies a contingency when the court may permit one of the parties to cut the timber, and prescribes the conditions necessary to be complied with. This act was evidently intended to preserve the timber upon lands in litigation, pending the suit. Section 2 was intended to regulate the practice of giving bonds, which had obtained since *Lumber Co. v. Wallace,* 93 N. C., 22, and similar cases.

The rapidly increasing value of timber trees doubtless prompted the Legislature of 1885 to enact chapter 401, but the efficacy of this act was diminished by the general practice of permitting the defendant to give bond and to cut the timber *pendente lite,* or otherwise to appoint a receiver and permit the rental value or stumpage to be paid to him. The Legislature of 1901 has thrown greater safeguards around the rights of such litigants, and now, when the plaintiff satisfies the judge that his claim is *bona fide* and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined.

The plaintiffs offer in evidence a deed from Gustavus Dupey to Samuel Moore purporting to convey "a certain piece or parcel of land, lying and being on the south side of Pamlico river and the south side of Blount's creek, containing 75 acres, be the same more or less; it being the same land that James Peele conveyed to Hiram Edgerton by deed, which deed will more fully show courses and distances, reference being had to the said deed, and deeded by Hiram Edgerton to William E. Shaw." It is contended that this deed is void for uncertainty of description. The plaintiffs, in addition to the general principles of law, rely on the Act of 1891, chapter 465, in support of this deed. It is unnecessary to consider the value of such act as an aid to the plaintiffs' case. It is not probable that the General Assembly intended to repeal the section of the Statute of Frauds, requiring conveyances of land to be in writing. A deed which fails to describe any land is as void now as it was before the passage of the Act of 1891.

It is plain that the deed is not void, for it calls for the same land conveyed by James Peele to Hiram Edgerton, and by Edgerton to Wm. E. Shaw. These latter deeds can be offered in evidence on the trial and the land probably be located. *Id certum est,* etc. The fact that they were not offered at the hearing before the judge does not compel a dissolution of the injunction. On such hearings, the title is not required to be proved with that strictness and certainty of proof as upon the trial. The plaintiffs offer affidavits tending to prove that the land is well known by name, to-wit, as the Peele or Sam Moore land, and that the boundaries are known to witnesses and can be easily located. Description by name, where lands have a known name, is sufficient, and a tract of land may then be located by its name. *Scull v. Pruden,* 92 N. C., 168, citing many cases.

As we understand the case the defendants do not claim this James Peele or Sam Moore land, and they express a

desire to keep off of it. It is therefore proper for the plaintiffs to point out to the defendant immediately the boundaries of the James Peele land as claimed by them, so the defendants' agents may not unwittingly trespass, pending the trial of the title. The order of the judge below is

Affirmed.

PRITCHARD v. MITCHELL.

(Filed September 12, 1905).

Nonsuit—Misjoinder of Parties—Assignments for Benefit of Creditors—Sureties.

1. Where the complaint did not set out any cause of action in favor of one of the plaintiffs, the court properly allowed such plaintiff to submit to a nonsuit, it being simply a case of misjoinder of parties plaintiff which may be corrected by taxing him with such costs as are incurred by the misjoinder.

2. Laws of 1893, chapter 453, section 1, which enacts: "That upon the execution of any voluntary deed of trust, or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once," applies to the sureties upon a note of the assignor.

ACTION by William Pritchard and others against G. H. Mitchell and others, heard by *Judge E. B. Jones*, upon demurrers, at the Spring Term, 1905, of the Superior Court of BERTIE County.

This action was instituted July 5, 1904, by Wm. Pritchard and C. W. Mitchell for the recovery by said Pritchard of the amount of a note executed by the defendants, Carter, Matthews & Co., J. H. Matthews, deceased, and Geo. H. Mitchell to C. W. Mitchell. The complaint set out the note by which it appears that J. H. Matthews and Geo. H. Mitchell were sureties; that the note was due and payable

January 1, 1906, and was for value assigned to the plaintiff, William Pritchard. The defendants, Carter, Matthews & Co., the principal debtors, became insolvent, and prior to the institution of the suit made a general assignment for the benefit of their creditors. On June 10, 1904, the defendant, Geo. H. Mitchell, one of the sureties on said note, served notice on the plaintiffs, Pritchard and C. W. Mitchell, to bring suit on said note; that before bringing suit, the plaintiff, Pritchard, offered to assign said note to the surety, which offer was declined. The plaintiff, Pritchard, demanded judgment for the amount of the note. The defendants, Geo. H. Mitchell and Mrs. Maggie Matthews, administratrix of J. H. Matthews, demurred, assigning as grounds therefor, first, misjoinder of parties plaintiff and causes of action; second, that as to the sureties the note was not due and payable. The other defendants demurred for the misjoinder. Before the hearing of the cause was begun, C. W. Mitchell was, upon his own motion, permitted to submit to a judgment of nonsuit, and the defendants excepted.

The cause was thereupon heard upon complaint and demurrer. The court below overruled the demurrer and proposed to render judgment giving the defendants time to file answers, which they declined, stating that they would stand by their demurrer. Judgment was thereupon rendered, and the defendants excepted and appealed.

Francis D. Winston for the plaintiffs.
Winborne & Lawrence for the defendants.

CONNOR, J., after stating the facts: His Honor properly allowed the plaintiff, C. W. Mitchell, to submit to a nonsuit. The complaint did not set out any cause of action in which he was interested or entitling him to any relief; nor did he ask for any judgment. It seemed to be assumed that he endorsed the note. It does so appear from the complaint, the

allegation being that he assigned it. This, however, is not material, as in no aspect was he entitled to any relief. It is simply a case of misjoinder of parties plaintiff, and upon demurrer or motion may be corrected by taxing the plaintiff with such costs as are incurred by the misjoinder. Clark's Code, section 239, sub-section 4 and cases cited. The complaint stated no cause of action in favor of C. W. Mtchell; therefore it was only necessary to move the court for judgment against him for costs. This result was anticipated by him and he was permitted to take a nonsuit. There was no cause of action to be *nol prossed*. His retirement from the record did not necessitate any change in the complaint. The case is in this respect distinguished from *Mitchell v. Mitchell*, 96 N. C., 14, and *Cromartie v. Parker*, 121 N. C., 199. It is like *Green v. Green*, 69 N. C., 294, in which *Pearson, C. J.*, says: "As to the unnecessary parties plaintiff it is their own concern to be made liable for costs."

The serious question presented by the demurrer is whether the Law of 1893, chapter 453, section 1, which enacts: "That upon the execution of any voluntary deed of trust or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once," applies to the sureties upon a note of the assignor. It is an elementary principle that every contract is made with reference to the existing law; hence the principal debtor at the time he executed the note promising to pay the sum named on January 1, 1906, made it a part of his contract that if he made an assignment for the benefit of his creditors, the debt would become due and payable at once. It is equally well settled that the contract of suretyship is measured by, and is coextensive with the liability of the principal. The law as held by this court is stated by *Ruffin, C. J.*, in *Shaw v. McFarlane*, 23 N. C., 216: "If two persons are bound by a bond or a judgment for the payment of a sum of money, the one is liable to the creditor in the same manner and to the same ex-

tent as the other, although as between themselves, they stand as principal and surety. In respect to the creditor, they are joint debtors, fixed with the same obligation." In this respect the contract of the surety is distinguished from that of a guarantor. 27 Am. & Eng. Enc., (2nd Ed.), 432; 1 Brandt on Suretyship, 2. It would seem therefore that, when by the terms of the contract interpreted in the light of the statute, the principal is bound in the event of his making an assignment, to pay at once or accelerate the maturity of the debt, the surety is bound in like manner. This does not involve any change in the contract, but incorporates the provision of the statute into it.

We have examined the cases cited by the defendant's counsel, and we do not think they conflict with the conclusion which we have reached. The judgment must be

Affirmed.

MERRELL v. DUDLEY.

(Filed September 19, 1905).

Malicious Prosecutions—Res Gestae—Instructions—Malice.

1. In an action for malicious prosecution, the declarations of defendant at the time he sued out the warrant of arrest and accompanying that act, are competent as part of the *res gestae*, and also as corroborative testimony.

2. The expression of the trial judge in charging the jury, "If you believe from the evidence * * * " is inexact and should be eschewed, yet the use of such language is not reversible error unless it clearly appears that the appellant was probably prejudiced thereby.

3. In an action for malicious prosecution, a charge that malice may be inferred by the jury from a want of probable cause and "other circumstances" does not mean that both a want of probable cause as well as corroborating circumstances are required to prove malice.

MERRELL *v.* DUDLEY.

ACTION for malicious prosecution by C. A. Merrell, by his next friend, against Thomas Dudley, heard by *Judge J. L. Webb* and a jury, at the Spring Term, 1905, of the Superior Court of CARTERET County. From a judgment for the defendant, the plaintiff appealed.

Chas. L. Abernethy for the plaintiff.
D. L. Ward and *L. I. Moore* for the defendant.

BROWN, J. The evidence tends to prove that the defendant lost a shovel and after looking for it for several days he was informed the shovel was in the possession of the plaintiff. He went to the plaintiff and asked him to bring the shovel back. The plaintiff used insulting language to the defendant and did not return the shovel. The defendant then went to Magistrate Springle and asked him what to do. After some preliminaries, the magistrate advised the defendant to take out a warrant. At the time the defendant applied to the magistrate to know what to do, he stated that he had found the shovel in the possession of Merrell and asked him to bring it back. Merrell did not bring back the shovel until the day of the trial, when he produced the shovel which was turned over to the defendant, and the case was dismissed. The magistrate wrote the warrant after advising the defendant to take that course.

The justice of the peace, Springle, was permitted to testify over plaintiff's objection, upon cross-examination by defendant, that defendant had told him at the time he issued the warrant that he had found the shovel in the possession of Merrell and asked him to bring it back, and Merrell said, "to hell with the shovel."

1. It is generally true that the declarations of a party to an action are not competent in his own behalf. When they are corroborative it is permissible to admit them, but the judge should explain to the jury the character of such

evidence and the weight to be given to it. This was not done in this case, but no exception has been taken by the plaintiff to the omission. It appears from the record that the examination of defendant Dudley preceded this part of the cross-examination of Springle, and the testimony was properly admitted both as corroborative and as a part of the *res gestae*. This declaration is original evidence as part of the *res gestae*. Declarations or acts accompanying any act or transaction in controversy and tending to explain or illustrate it are received in evidence as a part of the *res gestae*. *Doorman v. Jenkins*, 29 E. C. L., 80; *Trav. Ins. Co. v. Moseley*, 8 Wall., U. S., 397. The act or transaction in controversy in this case is the wrongful, malicious suing out the warrant of arrest without probable cause. The declarations of defendant at the time he sued out the warrant and accompanying that act are, therefore, a part of the "thing done." The circumstances, facts and declarations which grow out of the main fact are contemporaneous with it, and serve to illustrate its character. This exception and the other exceptions to the evidence are untenable.

2. The plaintiff also excepts to certain expressions used by the judge below in charging the jury: "If you believe from the evidence * * * " is an expression urged upon our attention by the plaintiff as erroneous and prejudicial. It is true that the language is inexact, and this form of expression should be eschewed by the judges in charging juries. This court has heretofore called attention to it in a number of cases. *Barrett's case*, 123 N. C., 753; *Green's case*, 134 N. C., 661; *Wilkie v. Railroad*, 127 N. C., 203; *Sossamon v. Cruse*, 133 N. C., 470. In the latter case, *Mr. Justice Walker* has pointed out with clearness the objection to this form of expression.

We do not regard the use of such language as reversible error unless it clearly appears that the appellant was probably prejudiced thereby, which does not appear to us in this case.

We trust the judges of the Superior Court will in future be advertent to these views as repeatedly expressed by this court.

3. Malice may be inferred by the jury when a want of probable cause for the prosecution is shown to their satisfaction. *Kelly v. Traction Co.*, 132 N. C., 369. His Honor so charged the jury and said further that malice may be inferred from "other circumstances." A jury is not compelled to infer malice from a want of probable cause. They may do it and so they may look for other circumstances. In using the words "other circumstances," in the same sentence and connection in the charge, we do not think His Honor should be interpreted as meaning that both a total want of probable cause as well as corroborating circumstances are required to prove malice.

The several exceptions set out in the record have been carefully examined, and we find nothing in them which renders a new trial necessary. The judgment is therefore

Affirmed.

STOCKS v. CANNON.

(Filed September 19, 1905).

Evidence of Transaction with Deceased—Doctrine of Satisfaction.

In an action for services rendered the testator of defendant, when the plaintiff testifies as to the value of services "rendered," though he does not state in so many words that he had rendered them to testator, he necessarily speaks, though perhaps indirectly, of a transaction or communication with the deceased, and the testimony is incompetent under section 590 of The Code, which is intended to exclude even the indirect testimony of an interested witness as to a transaction or communication with the deceased, as the latter cannot be heard in reply.

Discussion of the equitable doctrine of satisfaction.

STOCKS *v.* CANNON.

ACTION by S. A. Stocks against Jesse Cannon and J. S. Cox, Executors of T. C. Cannon, heard by *Judge J. L. Webb* and a jury, at the April Term, 1905, of the Superior Court of PITT County. From a judgment for the plaintiff, the defendants appealed.

This is an action to recover for services alleged to have been rendered to the testator of the defendants. Plaintiff was introduced as the first witness for himself and testified as follows: Q. You are the plaintiff in this action? A. Yes. Q. Where did you work from April 1, 1901, to April 27, 1904, and what class of work did you do? (Defendants objected to the witness speaking about any work upon land belonging to deceased within the time stated. Objection overruled and defendants excepted). A. I was on the public road a little and in the field, if I am not to speak about the time I was at work on the land of the deceased. Q. What was your business on the road? A. Attending to business. Q. Attending to business of some one else than yourself? A. Yes. Q. What was the value of those services rendered during that time? A. They could not have been less than $2,000. (Defendants objected, objection overruled and defendants excepted). Q. What services did you render T. C. Cannon from April 1, 1901, to April 27, 1904? (Excluded). Q. In these services for three years, mention whose team you used? A. My own. Q. How much have you received for your services all that time? A. $309.

There was other testimony as to the services rendered by plaintiff to the testator and their value, but it is not necessary to state it, as the decision of this court is confined to the competency of that already set out.

Fleming & Moore for the plaintiff.
Skinner & Whedbee for the defendants.

WALKER, J., after stating the case: The testimony of the

plaintiff to which the defendants objected was incompetent. It is clear to us that it related to a transaction and perhaps to a communication with the deceased. It is true the witness did not state in so many words that he had rendered any services to the testator, but that he had is plainly implied in the questions and answers. It would have been futile to ask the witness about services he had not rendered to the deceased, as the question being tried was whether he had rendered services to him and the value of any services so rendered, and not whether he had rendered services to some one else. The examination, as was said in the argument, was very adroit and skilful, but we do not think the plaintiff succeeded in avoiding the prohibition of the statute, Code, section 590. We must construe and enforce that wise and salutary provision of the law, so as to effectuate the evident intention of the Legislature, which is to exclude even the indirect testimony of an interested witness as to a transaction or communication with the deceased, as the latter cannot be heard in reply. Besides, there is a striking correspondence between the value of the services described in the witness's answers and the amount of the payment made by the deceased on the one hand and the allegations of the complaint relating to those matters on the other. In his complaint the plaintiff values the services rendered to the deceased at $1,900 and alleges that he has already received for them $309. In his answer to the following question: In these services for three years, mention whose team you used? A. My own, the witness refers unmistakably to services performed for the testator; and when in the last question he is asked as to the amount received for his "services all that time" and answers, $309, which is the very amount paid by the deceased, how can we escape the conclusion that in his testimony he was referring to services rendered to the deceased? The context discloses that the witness meant, when answering the questions to which objection was taken, to refer to services he had

rendered to the testator. When a witness is asked and testifies as to the value of services "rendered," he necessarily speaks, though perhaps indirectly, of a transaction or communication, as he could not well have rendered services to the deceased without having had some sort of transaction or communication with him, the exact nature of which depending upon the kind of services rendered. *Davidson v. Bardin* at this term; *McGowan v. Davenport,* 134 N. C., 526. If the testimony did not have reference to services rendered to the deceased, it was irrelevant, and under the circumstances it was calculated in our opinion to mislead the jury and to prejudice the defendant. We conclude that the testimony was objectionable within the spirit and meaning of section 590 of The Code, as well as within its letter, and should have been excluded on that ground, and if not on that ground, then it should have been rejected for the other reason assigned. For the error in admitting it, a new trial is ordered.

The other exceptions are not passed upon, as the case may be differently presented at the next trial. It may be well, though, for the defendant's counsel to consider whether the rule he invokes, that a legacy to a creditor is presumed to be in satisfaction of his debt should be applied to a case where the amount of the creditor's claim is not fixed. In this case the jury found it to be much larger in amount than the legacy. Bispham in his Principles of Equity (6th Ed.), p. 664, section 538, says: "Where one person is under some legal or moral obligation to another, and under those circumstances makes a gift of such a nature that it operates as an exact fulfilment of the obligation, there arises a presumption that it was the intention of the donor to discharge the obligation by making the gift; in other words, the gift is presumed to be in satisfaction of the obligation, and hence this presumption, which had its origin in courts of chancery, has given rise to what is known in equity as the doctrine of

satisfaction." He further says on the same page that the doctrine has frequently been regarded with no little disfavor, and the presumption of the testator's intention, upon which it is founded, can be rebutted by slight circumstances, evidence of his express intention being admissible and that presumptions may be drawn from surrounding circumstances, by which the supposed intention that the gift should operate as a satisfaction may be contradicted or controlled. He further says, "It is a general rule both in England and in this country that a legacy given by a debtor to his creditor, which is equal to or greater in amount than the debt, shall be presumed to be intended as a satisfaction of the debt, but it must be not only equal in amount, but equally beneficial and of the same nature exactly. It will be observed that this statement of the rule both indicates the general doctrine and also suggests some considerations by which its application may be controlled." Bisp., p. 664. The doctrine as thus stated seems to be recognized by this court in *Ward v. Coffield*, 16 N. C., 108, and *Perry v. Maxwell*, 17 N. C., 488. We do not decide this interesting question raised by the fact that the testator bequeathed $500 to the plaintiff, as a new trial has been awarded, and we prefer to leave the matter open to be decided upon the facts as finally ascertained. They may not be the same as those we now have before us.

New Trial.

VANDIFORD v. HUMPHREY.

(Filed September 19, 1905).

Husband and Wife—Abandonment—Free Trader—Evidence.

1. An instruction on the issue of abandonment under section 1832 of The Code, that if the husband "at the time of the execution of the deed in question by his wife, did voluntarily leave his wife, desert her, prior to the time of the execution of the deed, with the intention of forsaking her entirely and never to return," the jury should answer the issue "yes," was correct.

2. While a safe test of the power of the wife to contract in regard to her separate property as a free trader, when abandoned by her husband, is her right to maintain an action for divorce for like cause; yet she is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts.

3. The statute (Code, section 1832,) does not require the departure of the husband from the State to enable the wife to use her property for her support.

4. Evidence that the husband was all the time abusing his wife because she would not give him a life estate in the land; that he left and said he was not coming back any more and carried his things and his tools, buggy and harness, bed and bedding and said that he had left her for good this time, is sufficient to be submitted to the jury on the issue of abandonment.

ACTION by Jackson Vandiford and wife against John C. Humphrey and wife, heard by *Judge J. L. Webb* and a jury, at the March Term, 1905, of the Superior Court of PITT County. From a judgment for the defendants, the plaintiffs appealed.

F. C. Harding and *Jarvis & Blow* for the plaintiffs.

L. I. Moore for the defendants.

CONNOR, J. This action is prosecuted by plaintiffs, Jackson Vandiford and wife, for the cancellation of a deed executed by the *feme* plaintiff to defendants conveying a tract of land, being her separate estate. The validity of the deed is attacked for that, (1) the *feme* plaintiff was a married woman at the date of its execution; (2) the execution was obtained by fraud and undue influence; (3) the *feme* plaintiff was of unsound mind and incapable of executing a valid conveyance. The defendants admitted the coverture, but alleged that at the date of the execution of the deed, the male plaintiff had abandoned the *feme* plaintiff. They denied the other allegations of the complaint. Appropriate issues were submitted to the jury in respect to the several allegations, under instructions, to which there are no exceptions, the jury found for the defendant upon the last two issues. The plaintiffs requested His Honor to charge the jury that there was no evidence to sustain the defendants' averment of abandonment, and to the refusal to do so excepted. His Honor instructed the jury upon the first issue as follows: "Abandonment means forsaking, deserting. An eminent law writer says abandonment means the voluntary leaving of the person to whom one is bound by special relation, as wife, husband, child, deserting. The court charges you that frequent protracted absence of the husband and the practice of the wife of transacting business, nothing else appearing, would not mean abandonment. If you find from the greater weight of the evidence that Jackson Vandiford at the time of the execution of the deed in question by his wife, did voluntarily leave his wife, desert her, prior to the time of the execution of the deed, with the intention of forsaking her entirely and never to return, why then you ought to answer the first issue "yes;" but if you find that Jackson Vandiford had not abandoned his wife, deserted her, at the time of the execution of the deed in question as alleged by the defendants, then you will answer the first issue, "no." If you find that

she refused to let her husband live with her, threatened that if he stayed with her, he did so at his own risk, as testified to by him, if you believe that and if you further find that this was the cause of his leaving his wife and that he left her with the intention to return as soon as she would permit him, then this would not be abandonment and you would answer the first issue "no." To this instruction plaintiffs excepted. The jury found for the defendants, and upon the verdict judgment being rendered, plaintiffs appealed.

The undisputed facts show a most fertile field for domestic discord. The *feme* plaintiff was a widow with five children by her first husband, and owned a small tract of land. The male plaintiff was over seventy years of age. Frequent quarrels were had, followed by separations lasting several months, etc. We have examined with care the testimony bearing upon the first issue. It is true that as usual, after reconciliation and changed conditions, the husband and wife deny that there was any other trouble than a slight disturbance incident to domestic life. There is a vast amount of contradictory and conflicting evidence in regard to the declarations of both parties. The jury were invited to a very thorough investigation of the home life of the families involved in this controversy. The contention of the plaintiffs that there was no evidence to sustain the charge of abandonment, is very largely dependent upon the correctness of their view of the legal definition of the term as used in the statute, Code, section 1832. If, as contended by the learned counsel, the power of the wife to deal with her property as a free trader, arises only when her husband has left the jurisdiction of the court with no intention to return, is correct, then of course His Honor's ruling is erroneous. He concedes that this court has held in *Hall v. Walker,* 118 N. C., 377, that the statute is constitutional. He insists that, as in that case, to constitute abandonment, the husband must have left his wife with no intention of returning to her and departed from

the State. Our attention is called to a well considered case decided by the Supreme Court of Maine, which seems to sustain this view. *Ayer v. Warren,* 47 Me., 217. It is also insisted that the power of the wife to contract in regard to her separate property as a free trader, is to be tested by her right to maintain an action for divorce for like cause. This, we think, a safe test, but counsel further insist that until the time has elapsed entitling her to bring the action she should not be permitted to make contracts. This construction we think would, to a very great extent, destroy the beneficent purpose of the statute. The law requires that six months shall elapse after the injury complained of has been committed, to enable the parties to become reconciled, but it cannot be contemplated that during this time a wife who has been abandoned by her husband shall either starve or become a charge upon the charity of her friends. If she has a separate estate she should be allowed to resort to it by making contracts for the purpose of supplying the necessaries of life. The two statutes are based upon distinct reasons. The wife may and should wait six months after abandonment before rushing into court for a divorce, but she may not and should not be required to starve or go without support for that time, waiting the return of her recreant husband. We cannot reach the conclusion that the statute requires the departure of the husband from the State to enable the wife to use her property for her support. We think that His Honor correctly instructed the jury as to the law. While the testimony is conflicting we are of the opinion that there was evidence fit to be submitted to the jury. It would serve no good purpose to set it out at any length, but we note the following: Amos Stocks testified that, "He, the husband, was all the time abusing her because she would not give him a life estate in the land. He left and said he was not coming back any more. He carried his things and his tools, buggy and harness, bed and bedding. Jesse Stocks testified that

Vandiford said, "That he had left her for good this time." There was other testimony to the same effect. The *feme* plaintiff, after her husband left her, went to live with the defendant, Humphrey, who had married her daughter, and it would seem, and the jury so found, of her own free will executed the deed by which she charged upon the land a support for herself and the payment of $400 at her death to her other children. The contract seems to have been fair in its terms and freely made by her. The amount to be paid is approximately the value of the land. All suggestions to the contrary have been passed upon by the jury.

We have, after a careful consideration, found no error in the ruling of His Honor. The judgment must be

Affirmed.

TYSON v. JOYNER.

(Filed September 19, 1905).

Negotiable Instruments—Endorsements—Equitable Defenses—Evidence—Instructions.

1. In an action on a note, it is error to hold that the mere introduction of the note, with the name of an endorsee written on the back, is evidence of its endorsement by such endorsee, so as to vest the legal title in the plaintiff and cut off any defenses against the endorsee, as the signature of the endorsers, where endorsement is required to vest the legal title, must be proved.

2. In an action on a note, the mere introduction of the note raises a presumption that the holder is only the equitable owner, and it is subject to any equities or other defenses of the maker against prior holders.

3. A note payable to order must be specially endorsed by the payee (and prior endorsees, if any,) to the holder or at least in blank to make him its legal owner and the *bona fide* holder of a title good against prior equities of which he is not shown to have had notice.

4. An instrument payable to bearer can be negotiated by delivery and consequently no endorsement is required.

5. Where a note is endorsed in blank, the holder has the authority to make it payable to himself or to any other person by filling up the blank over the signature, and this may be done at, or before, the trial.

6. Where, in an action on a note, the plaintiff had proven only an equitable title thereto, an instruction was erroneous which cut off matters of defense existing between the defendant (maker) and an endorsee.

ACTION by M. E. Tyson against J. H. Joyner, heard by *Judge J. L. Webb* and a jury, at the March Term, 1905, of the Superior Court of PITT County.

This action was brought to recover on a bond for $200, executed in 1897 by defendant and payable to J. L. Little or order. Defendant alleged, and there was evidence tending to show, that he at the request of his brother, S. V. Joyner, signed the note for the accommodation of the latter, and gave a mortgage to secure it. S. V. Joyner received the amount of the note less the discount. Little did not discount the note or pay any consideration for it, but endorsed it to B. F. Tyson, who, it seems, paid the money to S. V. Joyner. Plaintiff at the trial introduced the note and rested. The name of B. F. Tyson was endorsed on the note, but there was no proof of the signature other than the production of the note by plaintiff. Defendants objected to this as evidence of the endorsement of the note by Tyson. The objection was overruled and he excepted. Endorsement of the note by B. F. Tyson was alleged in the complaint and denied in the answer.

Defendant further alleged that Tyson, who was commissioner to sell certain land, had agreed at the time the note was executed to pay it out of that part of the proceeds of the sale which would go to defendant in satisfaction of a judgment held by him, and which was a lien on the land, and he

afterwards collected more than enough for that purpose. Defendant relied upon this agreement and the receipt of the money by Tyson as a payment or satisfaction of the debt, or at least as a set-off or counterclaim.

The issues and answers thereto were as follows: 1. Is the note declared on the property of the plaintiff, M. E. Tyson? Ans. Yes. 2. In what amount, if any, is the defendant, J. H. Joyner, indebted to the plaintiff? Ans. $200 with interest from February 12, 1897. The court charged the jury that if they believed the evidence they should answer the issues as above indicated. From a judgment for the plaintiff, the defendant appealed.

Fleming & Moore for the plaintiff.
Skinner & Whedbee for the defendant.

WALKER, J., after stating the case: There was much argument as to whether the note or bond had been duly executed, that is, delivered, as Little did not accept it nor advance any money on it, but it is not necessary to discuss this matter as we think the defendant had virtually admitted its execution by the form of his answer, and the case was not tried below upon the theory that the note was not a completed instrument when it passed into the hands of Little and then by endorsement to Tyson. The only questions presented there related to the character of plaintiff's ownership of the note and the validity of defendant's plea of payment or counterclaim.

The court erred in holding that the mere introduction of the note was evidence of its endorsement by Tyson, so as to vest the legal title in plaintiff and cut off any defenses good against Tyson. It is very true, as contended by counsel, that the introduction of the note by plaintiff raised the presumption that she was its owner, but only the equitable owner or assignee, and it was subject in her hands to any equities or other defenses of the maker against prior holders. The note

must have been endorsed specially to her, or at least in blank, to justify the claim that she is its legal owner, and the *bona fide* holder of a title good against prior equities of which she is not shown to have had notice. It was necessary, therefore, to show such an endorsement in order to defeat any equity the defendant may have against B. F. Tyson. Referring to this doctrine, *Harlan, J.*, in *Osgood v. Artt*. 17 Fed. Rep., 575, says: "It is a settled doctrine of the law-merchant that the *bona fide* purchaser for value of negotiable paper, payable to order, if it be endorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without endorsement, takes by the law-merchant only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee. The purchaser in such case becomes only the equitable owner of the claim or debt evidenced by the negotiable security, and in the absence of defense by the payor may demand and receive the amount due, and, if not paid, sue for its recovery in the name of the payee, or in his own name when so authorized by the local law." In *Trust Co. v. Bank*. 101 U. S., 68, the court says: "The contract cannot therefore be converted into an endorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law-merchant, that is, from an endorsement. An assignee stands in the place of his assignor and takes simply an assignor's rights, but an endorsement creates a new and collateral contract." In *Lyon v. Bank*, 85 Fed. Rep., 120, it is held that a mere assignee of a promissory note, like an assignee of any other chose in action, takes his title subject to all equities and defenses which exist between the assignor and the other parties to the instrument, but an endorsee for value without notice before maturity

takes the title to such a note, according to the custom of merchants and the now established law of the land, free from all such equities and defenses. See also Tiedeman on Commercial Paper, sections 246 and 247. The same principle is well stated and illustrated by *Rodman, J.*, in the leading case of *Miller v. Tharel,* 75 N. C., 148, which has been followed in numerous cases by this court. *Spence v. Tapscott,* 93 N. C., 246; *Lewis v. Long,* 102 N. C., 206; *Jenkins v. Wilkinson,* 113 N. C., 532; *Christian v. Parrott,* 114 N. C., 215; *Bresee v. Crumpton,* 121 N. C., 122. An instrument payable to bearer can be negotiated by delivery, and consequently no endorsement is required. Norton on Bills and Notes, section 58; *Bresee v. Crumpton, supra.* "When, however, a bill or note unendorsed by the payee or endorsed by the payee specially and unendorsed by his endorsee, is in the possession of another person, the question whether or not its bare possession is evidence of his right to demand payment, is of a different character. Without the endorsement of the payee or special endorsee, such possession would clearly not entitle the holder to the privileges of a *bona fide* holder for value, as, at best, he would only hold the equitable title to the instrument and could not sue at law upon it as a ground of action." 1 Daniel Neg. Inst. (5th Ed.), section 574. The signatures of endorsers, where endorsement is required to vest the legal title, must be proved. Norton on Bills and Notes, 331. In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law-merchant, which transfers the legal title, the equitable owner being the party in interest may now sue in his own name, Code, section 177, and he may recover subject to prior equities. *Spencer v. Tapscott* and *Bresee v. Crumpton, supra.* When it is said in the cases that "there is a *prima facie* presumption of law in favor of every holder of negotiable paper to the extent that he is the owner of it, that he took it for value and before dis-

honor and in the regular course of business," it will be found that reference is made to a holder by endorsement or to an instrument which, under the law-merchant, was not required to be endorsed, but which was negotiable by delivery. The expression was used in *Treadwell v. Blount,* 86 N. C., 33, cited by plaintiff's counsel, but in that case the note was endorsed and the signature of the endorser was proved.

It is familiar learning that, where a note is endorsed in blank, the holder has the authority to make it payable to himself or to any other person by filling up the blank over the signature, and this may be done at or before the trial. *Johnson v. Hooker,* 47 N. C., 29; *Lilly v. Baker,* 88 N. C., 151. It then becomes a special endorsement. In the case last cited, this court reversed the judgment below, upon the ground that the endorsement should have been filled up before judgment was rendered, assigning as a reason for its decision that the courts were particular in this respect in order to avoid the danger of notes being subsequently endorsed and again put in circulation. However this may be, the plaintiff in this case may fill up the endorsement, if she is so advised.

The court charged the jury that, if they believed the evidence, they should answer the issues in favor of the plaintiff. We infer from this instruction that the court was of the opinion that the defense or counterclaim, if a valid one, could not prevail against the plaintiff's title to the note. This was an error.

Whether the matters of defense were sufficient to defeat the plaintiff's recovery, we are unable to determine, as the evidence is not all one way and required a finding by the jury. Whether the defendant held the judgment in trust for his brother, for whose benefit he executed the note, or for other persons, and, if for his brother, whether the latter assented to the application by Tyson of his share of the proceeds of sale to the payment of the note, are questions to be passed upon by the jury with such others as may arise.

When the facts are found the validity of the defense can be determined. In the present state of the evidence and the case, we cannot decide that question. Besides, it may be that the plaintiff, by proof as to the endorsement of B. F. Tyson, will be able to cut off all alleged defenses to the action, unless the defendant can show affirmatively that she is not a *bona fide* holder of the note. The error in the ruling of the court entitles the defendant to another trial.

New Trial.

DIXON v. JONES.

(Filed September 19, 1905).

Deeds—Covenants of Warranty.

Where, in an action for breach of covenants of warranty contained in two deeds, one executed in 1886 and the other in 1895, the plaintiff recovered all that he was entitled to recover for breach of the covenant in the deed of 1895, his exception to the ruling that he could not recover on the covenant contained in the deed of 1886, is without merit, where the deed of 1886 does not purport to convey any part of the land from which the plaintiff has been legally evicted, as the warranty can extend no further than the land described in the deed containing the warranty.

ACTION by R. D. S. Dixon against J. O. W. Jones, to recover damages for breach of covenants of warranty contained in two deeds executed by defendant to plaintiff, heard by *Judge W. B. Councill* and a jury, at the December Term, 1904, of the Superior Court of GREENE County. From a judgment in favor of plaintiff, he appealed.

Geo. M. Lindsay and *L. V. Morrill* for the plaintiff.

L. I. Moore and *F. A. Woodard* for the defendant.

DIXON *v.* JONES.

BROWN, J. The material facts condensed from the record and case on appeal, briefly stated, are as follows:

1. On August 31, 1886, the defendant executed and delivered to the plaintiff a deed with the usual covenants of seizin, quiet enjoyment and general warranty, by which, for the consideration of $2,500 paid by plaintiff, he conveyed to plaintiff a tract of land in Greene County, described as follows: "Adjoining the lands of W. H. Edwards, Annie S. Rawls and others, bounded as follows, viz., beginning at Fool's Bridge, on the north side of Contentnea creek, and runs with the Goldsboro road to a point opposite the canal, which is the dividing line between Mrs. A. S. Rawls's dower or homestead and the tract hereby conveyed to the said Dixon, then the course of said canal and with said dower or homestead line of Mrs. Annie S. Rawls to Contentnea creek, then up the various courses of said creek to the beginning, containing 225 acres more or less."

2. On January 1, 1895, the defendant executed and delivered to the plaintiff and his wife, a deed with the usual covenants of seizin, quiet enjoyment and general warranty, by which, for the consideration of $500 paid by plaintiff, he conveyed to plaintiff and plaintiff's wife a tract of land in Greene County, described in said deed as follows: "Adjoining the lands of John Harvey, O. F. Worrell, R. D. S. Dixon and the Cobb heirs and others, bounded as follows: situated on the south side of the Goldsboro and Greenville road, and in the north fork of Fort Run and Contentnea creek and lying on the east side of the Snow Hill and Wilson road, and bounded on the west by the same and on the south by the Fort Run, and known as lands conveyed by the dower or life estate of Mrs. Annie S. Rawls, as by reference to record of same will more fully appear, containing by estimation 222½ acres more or less, the same being the tract or parcel of land conveyed by Marcellus Edwards to Dr. Swift." At December term, 1902, W. C. Swift and others recovered final

judgment against the plaintiff Dixon for all of the land covered by the above deeds which had ben allotted to Annie S. Rawls as her homestead. *Swift v. Dixon,* 131 N. C., 42.

In his complaint the plaintiff practically sets out two causes of action, one for the breach of the covenants contained in the deed of 1886 and another for the breach of the covenants in the deed of 1895.

The plaintiff contends that the lands, from which he has been evicted, embrace all the lands described in both deeds, except about 75 acres, which he claims are not worth over $500. His Honor gave judgment for the plaintiff upon the second cause of action for breach of the covenants in the deed of 1895 for all that the plaintiff under the evidence was entitled to recover for breach of those covenants, and held that the plaintiff was estopped to sue on the covenant contained in the deed of 1886. To this last ruling relating to the deed of 1886, the plaintiff excepted.

In the view we take of this appeal it is unnecessary to discuss the question of estoppel so fully argued by counsel.

We are of opinion that the deed of 1886 does not purport to convey any part of the land included in the judgment in *Swift v. Dixon,* and from which land only the plaintiff has been legally evicted. That judgment embraces none of the Rawls land except the homestead of Annie S. Rawls, which, in the language of the opinion, "had been laid off and located by metes and bounds before the sale by the commissioner." The deed of August 31, 1886, calls for "a point opposite the canal which is the dividing line between Mrs. Annie S. Rawls's homestead and the tract hereby conveyed to the said Dixon, thence the course of said canal and with said homestead line of Mrs. Rawls to Contentnea creek."

It is perfectly apparent that the deed of 1886 covers no part of the homestead, and as the warranty can extend no further than the land described in the deed containing the warranty, we are at a loss to understand the foundation of

the plaintiff's contention. The opinion in *Swift v. Dixon, supra,* takes the same view we do. In referring to this deed of 1886, *Furches, C. J.,* says, "Which deed only conveyed that part of the tract outside the homestead boundary. But after the death of Mrs. Rawls, the defendant (meaning Dixon) bought and took a deed from Jones for that part of the land covered by the homestead." This last reference is evidently to the deed of 1895. This latter deed does cover the homestead and nothing more, and as the plaintiff has been evicted from that, he was entitled to recover damages under the covenants contained in that deed. His Honor properly adjudicated such damages and gave judgment against the defendant therefor. He held that the plaintiff was entitled to recover nothing on account of the deed of 1886, which ruling we affirm, although upon other grounds than those which seem to have influenced the court below, the correctness of which it is not necessary for us to pass upon.

Affirmed.

CONNOR, J., did not sit on the hearing of this appeal.

DAYVIS v. TELEGRAPH CO.

(Filed September 26, 1905).

Telegraphs—Mental Anguish—Damages—Withdrawal of Incompetent Evidence.

1. The addressee of a telegram, where there has been a wrongful failure to deliver, or negligent error in transmission, may, under certain circumstances, recover compensatory damages for mental anguish, where the message is for his benefit or concerns his domestic or social interests, and this independent of any bodily or substantial pecuniary injury.

2. In an action to recover for mental anguish for negligence in the transmission or delivery of a telegram, it is not necessary that the claimant should be a very near relative, nor that the telegram should contain a message concerning sickness or death, but it is necessary that the grievance complained of should amount to a high degree of mental suffering and not consist simply of annoyance or disappointment and regret.

3. Before a recovery can be had for mental anguish, the telegraph company must be notified that mental anguish will naturally and reasonably follow as a result of its misconduct, either from the character and contents of the message itself or from facts within its knowledge, or brought to its attention at the time of accepting the message for transmission, or certainly in time to have enabled it to avoid the consequence complained of, by due care.

4. In an action by the plaintiff to recover for mental anguish from the failure of the defendant to deliver the following message sent to him by his wife: "Got left. Be there at 7:30 o'clock tomorrow." Signed "D," the testimony of his wife that when she gave the message to the operator she told him she had been thrown over in Weldon, had two children with her, they were sick, her husband was to meet her and would be worried unless he got the message, is ample to notify the defendant that its failure to deliver the message might result in actionable suffering and mental anguish.

5. In cases for mental anguish, in awarding the damages to be recovered, the law governing cases for breach of contract applies.

6. In an action by the husband for mental anguish the admission of evidence of the privation and suffering of the wife and children would be reversible error but for the fact that in the charge the court withdrew it from the consideration of the jury.

7. Where the court had in express terms told the jury that neither the privations of the wife nor her husband's mental anxiety, by reason of such suffering, should be considered by them, the addition that they should consider "only the mental anxiety of the husband by reason of these circumstances" could only mean such circumstances as under his charge should be held pertinent.

BROWN and CONNOR, JJ., dissent.

8. A telegraph company is liable in damages for the mental anguish suffered by the husband by reason of the company's default in failing to deliver a message sent by the wife who had taken the wrong train, informing him of this fact, the purpose of the message being to prevent anxiety. (*Sparkman v. Telegraph Co.*, 130 N. C., 447, overruled).

BROWN, J., dissents.

ACTION for mental anguish by James L. Dayvis against the Western Union Telegraph Co., heard by *Judge B. F. Long* and a jury, at the September Term, 1905, of the Superior Court of BEAUFORT County.

There was testimony to the effect that on the morning of June 26, 1904, plaintiff's wife left Durham, N. C., to go to Washington, N. C., to which place her husband had recently moved his residence. In the regular course of travel, Mrs. Dayvis would have reached Washington on the afternoon of the 26th, at about 6 o'clock; that she and two children who accompanied her were all sick, and she had written to the plaintiff, her husband, on Friday before leaving Durham on Sunday; that the plaintiff had sent his wife enough money to defray her expenses from Durham to Washington, via Selma and Rocky Mount. At Rocky Mount, by misdirection of a railroad station employee, she and her children were put on

the train going to Weldon, where they arrived about 5 p. m., and were unable to go on to Washington till the afternoon of the following day, June 27; that the plaintiff, who was expecting his wife and children on the afternoon train on June 26, had gone up on the morning train to meet them and had boarded the returning train in the afternoon, expecting to meet them at a station called Pactolus; he inquired for them and could get no information; he looked through the train and found their trunk checked through from Durham to Washington. Immediately on arriving at Washington, he went to his hotel and inquired for a telegram and none had been received; he then went to the telegraph office and it was closed; this was about 6:30. The train had arrived on time at about 6:20. He endeavored to get a telephone communication with his wife and children, but failed, and could hear nothing from them until their arrival on the train of the afternoon of the 27th, as stated. He was aware they were sick, and had only money enough to pay their way to Washington, and he suffered great distress and mental anguish by reason of his uncertainty as to their whereabouts, etc.; that the plaintiff had been a resident in Washington about one month, was at the Hotel Pamlico, and had received telegraphic messages at that place during his stay.

Mrs. Dayvis testified that when she arrived at Weldon with her children at 5 p. m., June 26, she went to the office of defendant company and wrote a message to her husband on one of its blanks as follows: "J. L. Dayvis, Washington, N. C. Got left. Be there at 7:30 o'clock tomorrow." Signed "D." She delivered it to the operator. She stated that she told the operator that she had been thrown over in Weldon, had two children with her who were sick, her husband was to meet her and would be worried unless he got the message, and told him to be sure to get it off right away, and he said he would; that she came back in an hour and a half and asked the operator if he had sent the message, and he said he got

it off all right; that the message was never received by the plaintiff.

The operator testified that the message was given him by Mrs. Dayvis at 5:12 in the afternoon of the 26th, and he sent it on not long after; that not being able to tell, when he read the message, whether it was signed "D" or "W," he carried the same to the hotel where she was and asked about it, and was told the letter was "D;" that she did not tell him who J. L. Dayvis was, nor what her name was, nor that she and her children were sick, nor that her husband would meet her and be worried if he did not receive the message; that all she said was that she had got on the wrong train at Rocky Mount, and she asked the witness to get the message off promptly; that she came back about six o'clock, or later, and asked if the message had been sent and heard from; he replied, "sent, but not heard from."

Under the charge of the court there was a verdict and judgment for the plaintiff and the defendant excepted and appealed.

J. D. Grimes and *W. B. Rodman* for the plaintiff.

F. H. Busbee & Son; Small & McLean and *Murray Allen* for the defendant.

HOKE, J., after stating the case: At the close of the plaintiff's testimony, and again at the close of the entire testimony, there was a motion to nonsuit by the defendant, and exception duly taken.

The decisions of this court have established the principle that the addressee of a telegram, where there has been a wrongful failure to deliver or negligent error in transmitting the message, may, under certain circumstances, recover compensatory damages for mental anguish where the message is for his benefit or concerns his domestic or social interests, and this, independent of any bodily or substantial pecuniary

injury. *Young v. Tel. Co.*, 107 N. C., 370; *Sherrill v. Tel. Co.*, 109 N. C., 527; *Kennon v. Tel. Co.*, 126 N. C., 232; *Wadsworth v. Tel. Co.*, 86 Tenn., 695. If mental anguish is shown to exist it is not required for a recovery that the claimant should be a very near relative. *Bright's case*, 132 N. C., 317; *Hunter's case*, 135 N. C., 458. Nor is it necessary that the telegram should contain a message concerning sickness or death. *Green's case*, 136 N. C., 489, 506. It is necessary, however, that the grievance complained of should amount to a high degree of mental suffering, within the natural and correct definition of mental anguish, and not consist simply of annoyance or disappointment and regret. *Hancock's case*, 137 N. C., 497.

The decisions further hold that before a recovery can be had on that account, the defendant company must be notified that mental anguish will naturally and reasonably follow as a result of its misconduct, either from the character and contents of the message itself or from facts within its knowledge, or brought to its attention at the time of accepting the message for transmission, or certainly in time to have enabled it to avoid the consequence complained of by due care and diligence. *Kennon's case, supra; Williams's case*, 136 N. C., 87; *Green's case*, 136 N. C., 489; *Cranford's case*, 138 N. C., 162.

The judge told the jury that such notice must be brought home to the defendant, and under his charge the jury have necessarily decided that the plaintiff's version as to what took place, at the time the telegram was handed to the defendant's agent, was the true one.

Applying these principles to the facts of the case before us, the plaintiff has made out a cause of action. The testimony of Mrs. Dayvis on that point was as follows: "When I got to Rocky Mount I went to Weldon. I got to Rocky Mount about 2 p. m. I got to Weldon about 5 p. m. registered at the hotel, went to the telegraph office (identifies

the message written out), gave it to the operator, told him I had been thrown over in Weldon, had two children with me, they were sick, my husband was to meet me and would be worried unless he got the message. I told him to be sure and get it off right away, and he said he would." (The defendant in apt time objected to all the conversation with the defendant's agent; objection overruled and defendant excepted). "I came back in an hour and a half and asked the agent if he had heard anything from the message and he said he had not yet, and I asked him if he had sent it off and he said he got it off all right."

The court is of opinion that there was ample testimony to notify the defendant that if the message was not delivered and the husband was thereby left in ignorance of the whereabouts and condition of his wife and children, it would be to him a matter of grave concern and might well result in actionable suffering and mental anguish. There was no error in overruling the defendant's motion to nonsuit.

In some of the cases on the subject of mental anguish, there is a strong intimation that the action should be in tort, as involving a breach of public duty, and there is high authority to the effect that only in this character of action can a suit be sustained by the addressee of a message. In awarding the damages to be recovered, however, where the right to damage has been established, the decisions of this court have thus far uniformly applied the law governing cases for breach of contract, and this course seems very generally to have obtained. 27 Am. & Eng. Enc. (2nd Ed.), 1059; Thompson on Law Elec., sec. 386.

In the examination of Mrs. Dayvis, who was a witness for plaintiff, she was asked by the plaintiff's counsel if she and her children had anything to eat in Weldon, the day they were there, and the witness replied, "Only a few cakes and a couple of cocoa colas." The witness was then asked why, and she replied "Because they had no money." This evi-

dence was admitted over the objection by defendant, and the defendant excepted. This is an action by Mr. Dayvis to recover damage for mental anguish by reason of his just alarm from being left uninformed as to the placing and condition of his wife and children. The actual privation and suffering of Mrs. Dayvis and her children are not pertinent to the inquiry. The testimony, if competent at all, could only have been so held as corroborative evidence, and under the circumstances of the case the court inclines to the opinion that the admission of the testimony would be reversible error but for the fact that, in the charge, the court entirely withdrew it from the consideration of the jury.

In response to prayers for instruction preferred by the defendant's counsel, the judge instructed the jury as follows: "I have been requested by counsel for defendant to instruct you that you should not consider any suffering or anxiety which the plaintiff's wife or children suffered by reason of taking the wrong car to reach Rocky Mount and having to stop at Weldon, or being ill during the time, or having no money with them. I give you that instruction. The defendant also asked me to instruct you that the jury should not consider any evidence with reference to the plaintiff's anxiety caused by the mental or physical suffering of his wife or children, due to the fact that they were unwell and without means to support them. The court gives you that instruction." The defendant concedes that this part of the charge would amount to a withdrawal of the objectionable testimony if it stood alone, but contends that it was in effect again submitted by reason of the following addition to the charge: "You will note that these last two instructions relate to recovery based upon the idea of the suffering of the wife or of the children, or of their anxiety and trouble that they may have had at Weldon. You will understand that this action is not brought by the wife nor by the children; it is brought by the husband; and therefore you are limited

in this case to a consideration of the husband and his suffering and mental anxiety by reason of these circumstances." The court does not think that these concluding words of the judge should receive the interpretation and effect insisted on by the defendant. The judge had just in express terms, and in response to a special request, told the jury that neither the privations of Mrs. Dayvis at Weldon nor her husband's mental anxiety, by reason of such suffering, should be considered by them, and when he added "only the mental anxiety of the husband by reason of these circumstances," by fair interpretation, we think this could only mean such circumstances as under his charge should be held pertinent, and no doubt the jury so understood it.

The court is referred by the defendant to *Sparkman's case,* 130 N. C., 447, as authority for the position that no recovery at all can be had in the case now being considered. In that case, S. B. Sparkman, at Durham N. C., at 2:10 o'clock p. m., March 11, 1904, received a message from one S. Johnston, Little Rock, Ark., that his brother, E. Sparkman, had died at Little Rock, Ark., on the day before. About two hours later S. B. Sparkman sent or left a message with the company addressed to S. Johnston, Little Rock, Ark., as follows: "Shall we look for him? What are you going to do?" Signed, S. B. Sparkman. The message was never delivered to Johnston, and, on action brought for mental anguish, judgment was given for the defendant. There is no doubt that this case is well decided, and for the reason given by the court that there was nothing in the language of the telegram nor in anything brought to the attention of the company leading it to believe that mental anguish would result by reason of the failure to deliver the message. "Surely," said the court, "the distance between Durham and Little Rock, in connection with the brother's death the day before the telegram was delivered to the defendant, would preclude any idea that there was a desire or purpose on the part of

the plaintiff to go to Little Rock to attend the funeral services." As a matter of fact, the case does not even disclose whether Johnston would have replied to the message if it had been received by him. The opinion, however, goes on to say that "The rule is well settled in *Akard's case* (Texas), and we adopt it. It is that a telegraph company is not to be held liable in compensatory damages for its failure to forward and deliver a message intended to relieve mental anxiety in the mind of the sender."

Akard's case refers for authority to *Rowell's case*, 75 Texas, 26, and of this authority the opinion in *Sparkman's case* further says that "*Rowell's case* seems to be a leading case." The headnote is "Anxiety caused by the failure of a telegraph company to deliver a message conveying information of the improved condition of a sick relative furnishes no ground for recovery against the company for its negligence."

Rowell's case was one where the plaintiff, J. H. Rowell, had received a message saying that his wife's mother "was worse, dangerously sick." He sent a message of inquiry, "How is mother? If no better, Josie comes tonight. Answer at my expense." A reply was forwarded to him, "Mother some better. Doctor says not dangerous." The last message the company failed to deliver, and, on action brought, the court held as stated that the plaintiff could not recover. In the opinion the court declares as follows: "We are of opinion that the demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion on the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of damage resulting from the breach. For injury to the feelings in such case the courts cannot give redress. Any other rule would result in intolerable litigation. We regard this case as differing in principle from that of *Stewart v.*

Tel. Co., in which damage for mental suffering has been allowed." This is the length and strength of the opinion in *Rowell's case.* It would seem to be an arbitrary limitation on the doctrine we are considering, not consistent with former decisions in the same jurisdiction, and the reasoning is far from satisfactory.

If a breach of contract, involving also a breach of public duty, by reason of which a telegraph company fails to relieve an oppressive and harrowing anxiety about the serious illness of a dear relative or the result of a dangerous and threatening surgical operation, cannot be made the subject matter of recovery in actions of this character, the doctrine should be abandoned.

It is not a correct premise to characterize such a grief or anxiety as "some kind of unpleasant emotion in the mind of an injured party incident to a breach of contract in most cases."

Nor is the conclusion convincing: "For injury to feelings in such cases the courts can give no redress. Any other rule would result in intolerable litigation." The limitation laid down in *Rowell's case* has been criticised by a recent writer and held to be inconsistent with other decisions on this subject. 3 Southerland Dam., section 975, and like comment is made in *Connelly v. Tel. Co.*, 100 Va., 51. The court does not think the principle laid down in *Rowell's case* is a sound one, and the opinion in *Sparkman's case*, in so far as it adopts such principle, is not approved.

There is some question if *Sparkman's case* applies to the one we are now considering in any way. This message was sent to prevent anxiety in the plaintiff's mind, and, but for the defendant's default, would have filled its mission, except perhaps for an hour and a half while the plaintiff was up the road in the expectation of meeting his wife.

There is no reversible error and the judgment is

Affirmed.

BROWN, J., dissenting: I am unable to agree with my brethren in the disposition made of this case. I am of opinion, first, that the motion to nonsuit should have been allowed, and, second, that there was error committed, and a new trial should be awarded.

1. The facts taken, in any light, do not show a case where a recovery for mental anguish should be allowed. The right to recover damages for mental anguish, not growing out of physical injury, is the settled law of this State, although the wisdom of permitting such recovery is denied by some of the ablest courts in the country. No one has ever contended that the damages are punitive in character. They are purely compensatory and are allowed for acute mental suffering. Anguish is defined to be "intense pain of body or mind" and is derived from *anguis,* a snake, referring to the writhing or twisting of the animal body. *Hancock's case,* 137 N. C., 501. We find no case where such damages are allowed for mere disappointment. This view of what constitutes that degree of mental suffering, for which actual or compensatory damages may be had, is endorsed by this court in *Hancock's case* and also in *Hunter's case,* 135 N. C., 459. The opinion in *Hunter's case* was written by *Justice Douglas,* who cannot be said to have unduly favored the telegraph companies.

The facts in this case, with which the defendant is connected, disclose nothing that should cause any feeling at all approximating *anguish* in the mind of a man of ordinary courage and self-possession. Doubtless the chief anxiety of the plaintiff arose from the fact that he had been guilty of such gross negligence as to supply his wife with only money enough to purchase a ticket from Durham to Washington, with nothing to buy bread with in case of an accident. When the plaintiff discovered at Pactolus that his wife and children were not on the train, common experience should have taught him that they had missed connection and that there were no reasonable grounds for serious apprehension. Knowing that

his wife was penniless, he naturally became alarmed. But that was his own fault. Had he supplied her with funds there would have been no occasion for great anxiety, much less anguish. There is nothing on the face of the message to put the defendant on notice that mental anguish might ensue if it was not promptly delivered, and what Mrs. Dayvis said to the operator at Weldon was not sufficient for that purpose. The "solemn issues of life and death" were not involved, nor serious illness, nor any of the usual circumstances disclosed, which indicated that great mental suffering might be caused by delay in its delivery.

Mrs. Dayvis testified that she took the wrong train at Rocky Mount and went on to Weldon and there filed the telegram set out in the record. She states, "I told the operator I had been thrown over at Weldon; had two children with me; they were sick; my husband was to meet me and would be worried unless he got the message." There is nothing here to put any one on notice that, what this court has defined mental anguish to be, would probably result from a failure to deliver the message.

The conclusion of Mrs. Dayvis, that her husband would be worried, is immaterial. Worry is not sufficient to justify a recovery. From the message and disclosure of Mrs. Dayvis, the defendant could draw only natural and reasonable inferences, which inferences would be that an ordinarily robust husband with ordinary self-control is waiting for his wife and children, and if he fails to meet them, he will take a common sense view of the matter and conclude that they are delayed somewhere en route, as is often the case. The company cannot foresee the result of its negligence due to facts not brought to its attention. It was not disclosed to the company, nor is it shown that the company was aware of the fact that Dayvis knew his children were sick or that his wife was without money; and these facts are stated by the plaintiff to be the real ground of his suffering. On cross-

examination he said he knew his wife would be uncomfortable; that he did not want his children suffering, because he knew they were sick; that he was worried because they did not come and because they did not have money enough to pay their expenses. Of these causes of his suffering, only one was brought to the attention of the company, that is, because his wife and children did not come. Could the company reasonably assume that this alone would likely cause him mental anguish? If not, then his suffering could not have been in the contemplation of the parties and the plaintiff should have been nonsuited.

On redirect examination, the plaintiff testified that his anxiety, because he feared his wife and children might be inconvenienced and uncomfortable, was the chief cause, and in fact the only cause of his suffering. It has often been held that distress, because of the discomfort of another, cannot be held the basis of an action for mental anguish. *Tel. Co. v. Stratemire,* 32 N. E., 871 (Ind.); *Tel Co. v. Cooper,* 71 Texas, 507. Any misapprehension suffered by the plaintiff, as to the meaning of the failure of his wife and children to arrive when expected, though resulting in mental anguish, cannot be made the basis of a recovery of damages. *Bowers v. Tel. Co.,* 135 N. C., 504; *McAllen v. Tel. Co.,* 70 Texas, 243.

2. There has been great trouble in ascertaining the ground on which telegraph companies may be held liable to the addressee of a telegram, not a party to the contract. Different views are advanced by courts and law writers, but this court seems to have adopted the contract theory. That being so, there must be some reasonable measure by which damages can be awarded. Doubtless having this in view, this court in *Sparkman's case* adopted the rule of the Texas Supreme Court and held that "a telegraph company is not to be held liable in compensatory damages for its failure to forward or deliver a message intended to relieve mental anxiety then

existing in the mind of the sender." In *Rowell's case,* 75 Texas, 26, the rule is applied to the sendee. It is impossible for a jury to measure in damages the extent to which the sendee may be injured by failure to relieve existing anxiety, for which the company cannot be held liable. The jury cannot well discriminate and distinguish between the anguish existing and that which might have been relieved.

In this case, the plaintiff was already, as claimed, suffering anguish. He ascertained at Pactolus that his wife and children were not on the train. He could not get a telegram until he reached Washington. Had he received the telegram what would he have learned? Only where they were. He would still have suffered all the distressing anxiety growing out of the knowledge that his family were in a strange town, sick and penniless, owing to his own improvidence. How can a jury under such circumstances measure the mental anguish for which the defendant may be liable, and distinguish it from the existing as well as continuing anxiety for which the defendant is not liable? The Texas court is advanced in its views on these questions, and having adopted its rule in *Sparkman's case,* I see no reason to overrule it.

3. It is admitted that the court erred in admitting improper testimony. I do not think the court below corrected its error. A careful reading of the attempted correction contained in the charge satisfies me that the jurors were permitted still to consider the mental anguish suffered by the plaintiff, growing out of a knowledge of his family's sick and penniless condition. This was well calculated to prejudice the defendant, and doubtless increased the damages which seem to be more than ample compensation for such anxiety, as a reasonably self-contained man should have suffered under the circumstances of this case, omitting those conditions for which the defendant is admittedly not responsible.

CONNOR, J., dissenting. I concur in the dissent of Mr. Justice Brown. I prefer to rest my dissent upon the last

ground assigned in his opinion. It is conceded that there was reversible error in the admission of testimony in regard to Mrs. Dayvis's condition, etc., while in Weldon, which entitles the defendant to a new trial, but for the instruction of His Honor. I do not think that the incompetent testimony, which was prejudicial to the defendant, was withdrawn. I concede that if incompetent testimony is withdrawn, the error in its admission is cured, just as if competent testimony is excluded if its admission could in no point of view have affected the verdict, the error is harmless. *State v. White,* 138 N. C., 704. With all deference, I do not think that His Honor withdrew or intended to withdraw the objectionable testimony. He expressly instructs the jury that they are limited to a consideration of the sufferings and mental anxiety of the husband "under these circumstances," concluding with the words "and therefore my instructions limit you to such recovery, as the husband should recover and not as to the wife." I do not think the testimony was competent for any purpose. It was predjudicial on the issue directed to the amount of damages to be awarded.

The defendant company was not responsible for the failure of Mrs. Dayvis to reach Washington on the 26th day of June or of her remaining in Weldon. The misdirection of some person connected with the railroad was the cause of her misfortune. The plaintiff's state of mind was caused by his failure to meet his wife on the cars at Pactolus. The breach of duty by the defendant did not cause this anxiety. The purpose of the wife in sending the telegram was to relieve this state of mind on the part of the husband. By reason of the failure to deliver the telegram, the state of mind continued—the mental anxiety was not relieved. A strikes B a blow causing pain. C, a physician, is called in and undertakes to relieve the pain. He negligently fails to perform his contract—he is liable in damages, not for the origin of pain, but for the negligent failure to relieve it. I concur with the

opinion of *Mr. Justice Hoke*, that the principle laid down in *Rowell's* and *Akard's case* and approved in *Sparkman's case*, is not sound. I am unable to see why a breach of assumed duty to perform an act, the purpose of which is to relieve mental anguish, does not confer a right of action upon the same principle that a similar breach of duty causes mental anguish. I wish to emphasize the necessity on the part of judges to use extreme caution in defining to juries the range within which they are permitted to move in assessing damages in this class of cases. In all cases, the original or primal cause of the suffering must be distinguished from the suffering caused by the breach of duty by the defendant. How far, in practice, it is possible for juries to do so must cause anxious consideration to courts. The entire subject is so fraught with obscurity and difficulty that one may well hesitate to enter upon its consideration. I note as an indication of the progress being made that *mental anxiety* is substituted for *mental anguish*. This case, like many others, shows gross and inexcusable negligence for which the law should give both redress and impose punishment.

EX PARTE McCOWN.

(Filed September 26, 1905).

Habeas Corpus—Contempts—Summary Punishment—Powers of Court, Under the Statutes and at Common Law.

1. The writ of *habeas corpus* can never be made to perform the office of a writ of error or appeal. The investigation is confined to the question of jurisdiction or power of the judge to proceed as he did, and the merits of the controversy are not passed upon.

2. In *habeas corpus* proceedings, this court is bound by the judge's findings of fact which were spread upon the record as required by the statute.

3. The power to attach for a certain class of contempts being inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise.

4. The Act of 1871, as brought forward in The Code, sections 648-654, is, in respect to the law of contempt, as broad and comprehensive in its scope and meaning as the common law itself, so far as it relates to those "inherent powers of the courts, which are absolutely essential in the administration of justice."

5. Where the respondent visited the judge at his boarding house, during a recess of the court, before the adjournment for the term, and assaulted the judge in consequence of a sentence pronounced at that term, *held*, that within the meaning of the statute, Code, sections 648-654, the conduct of the respondent was a direct contempt of the court as much so as if the assault had been made when the judge was sitting on the bench in open court.

6. At common law, the conduct of the respondent constitutes a contempt of court, and if the statute, Code, sections 648-654, does not embrace this case and in terms repeals the common law applicable to it, this court would not hesitate to declare the statute in that respect unconstitutional.

7. In direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus*, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal.

The petitioner, M. E. McCown, was attached for contempt by His Honor, *Judge G. W. Ward,* at the August Term, 1905, of the Superior Court of DURHAM County. He was adjudged in contempt and ordered to be imprisoned in the county jail for thirty days and fined two hundred dollars. Having no right to appeal from the decision (*State v. Mott,* 49 N. C., 449, *In re Davis,* 81 N. C., 72), he applied to the writer of this opinion as a justice of this court for a writ of *habeas corpus,* which was issued and made returnable before him on Monday, the 4th day of September, 1905. At the hearing, as counsel wished to avoid the necessity of two arguments of the case and it was also desired, owing to the great importance of the question and the peculiar circumstances of the case, that when the matter was heard in the Supreme Court all the justices should sit, it was agreed that argument should be waived and the matter should be decided upon the papers and an appeal entered so that the case could be heard at once in this court by a full bench—all defects and irregularities in the manner of bringing the case before this court for review being waived. An order was thereupon made remanding the petitioner to the custody of the sheriff in further execution of *Judge Ward's* sentence, and the whole matter has been brought into this court by exception and appeal for full hearing and consideration, argument of counsel being made here for the first time. If a direct contempt was committed, it is conceded that the respondent was properly committed and fined and that the judgment is unassailable. *Judge Ward's* findings of fact are as follows: "On Friday, September 1, 1905, one Allen Haskins was put on trial for

murder in the second degree in the Superior Court of Durham County, over which the undersigned judge was presiding. The jury, on Saturday afternoon in the same week, rendered a verdict finding the defendant guilty of manslaughter, and at the same time recommended the defendant to the mercy of the court. Judgment was prayed by the solicitor. It appeared to the court that the defendant had already been confined in the common jail of Durham County for more than ten months awaiting trial. After due and careful consideration of the case, the court, in view of all the evidence, the recommendation of the jury, and the length of time that the prisoner had already been imprisoned in jail, sentenced the prisoner to fifteen months at hard labor upon the public roads of Durham County. There being still unfinished business of the court, the court between four and five o'clock p. m., announced that it would not adjourn court *sine die,* as there was other business to transact, and told the court crier to announce that the court was adjourned until further notice from the judge, which the crier accordingly did, and the court was left open for the transaction of further business. The judge then left the court room and went to his room at his boarding house near by. In a short while thereafter, to-wit, about six o'clock p. m., the respondent, M. E. McCown, came to the room of the judge and called him out on a porch adjoining his room. The judge responded and went on the porch to meet the respondent, whom he found perfectly rational, and who at once accosted him in a very angry and menacing manner, complaining of the judgment rendered in the case of State v. Allen Haskins, and demanded that the judge at once should impose a longer term than the one already announced, or turn the prisoner out of jail. The judge listened to the statement, and respectfully considered it, as the respondent stated that he was there to see him about this case. He then asked the respondent in a quiet and mild manner if he was accustomed to speaking to the judge in that

way, adding that in the course of the case he had exercised his best judgment and discretion in the matter. Whereupon the respondent began to curse the judge violently, using most offensive language and following it up with an assault on the person of the judge. The minutes were not signed, and the judge intended to return and sign the same, and did sign them later. The court was a one week term, and for the trial of criminal cases only, and all the jurors had been discharged before the assault by respondent was committed. The judge had transacted no other business after the adjournment, as above stated, before taking up this matter with the respondent on the porch, except to change the sentence of one defendant, and adjust a matter of cost in another case, which he did before he left the court room, but after the crowd had left.

The respondent was present in court in person, and represented by attorneys, Messrs. Guthrie & Guthrie and Fuller & Fuller, and the court was represented by the solicitor. The respondent filed no answer in writing, his counsel waiving the same after suggesting to the court other facts, which it included in the findings above."

Fuller & Fuller and *Guthrie & Guthrie* for the respondent.

Robert D. Gilmer, Attorney-General, and *A. L. Brooks, contra.*

Walker, J., after stating the case: This matter, as now presented to us, really involves the correctness of the ruling of *Judge Ward* in the proceedings which resulted in the commitment of the respondent and the imposition of a fine upon him for contempt of court. If upon the facts, as found by the judge, a contempt was committed within the meaning and intent of the law upon that subject, or to express the same idea in somewhat different words and as it is usually stated, if the judge was in the exercise of a rightful juris-

diction in the particular case, his decision cannot be reviewed in a collateral way by the writ of *habeas corpus*. This court is bound by the judge's findings of fact, which were spread upon the record as required by the statute. *In re Deaton*, 105 N. C., 59; *Ex Parte Terry*, 128 U. S., 289. We cannot decide whether there was any merely erroneous ruling of the court or any irregularities in respect to judgment and procedure, as the writ of *habeas corpus* can never be made to perform the office of a writ of error or of an appeal. We are confined in our investigation to the question of jurisdiction or power of the judge to proceed as he did and cannot otherwise pass upon the merits of the controversy. There must have been a want of jurisdiction over the person or the cause or some other matter rendering the proceedings void, as this is the only ground of collateral attack. The law in this respect has been definitely settled, we believe, by all the courts. *Ex Parte Terry, supra; Ex Parte Savin*, 131 U. S., 267; Rapalje on Contempts, section 155. In *Ex Parte Reed*, 100 U. S., 13, the doctrine is thus clearly and concisely stated: "A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be not only erroneous, but absolutely void." The range of our inquiry, therefore, is narrowed to the question of jurisdiction and the validity of the order of *Judge Ward*. That the court had general jurisdiction of the subject of contempt cannot be denied; but do the facts stated in the record constitute a contempt within the meaning of the law? This is precisely the question now before us. We would have had less difficulty in deciding this case, if by the Act of 1871 (Code, sections 648 to 657), the Legislature had not defined contempts of court and declared that no other acts or conduct not mentioned therein should be "the subjects of contempt" and repealed the common law, in so far as it recognized as contempts other acts or conduct not specified in the statute. We

are satisfied that at common law the acts and conduct of the petitioner, as set out in the case, constitute a contempt of court, and if the statute does not embrace this case and in terms repeals the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void, for reasons which we will now state. That courts have inherent power to punish summarily for any direct contempt has unquestionably been settled by the authorities. Blackstone (vol. 4, 283,) says that the method of punishing contempts by attachment has been immemorially used by the Superior Courts of Justice. Contempts that are thus punished are either direct, which openly insult or resist the powers of the court or the persons of the judges who preside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create universal disregard of their authority, and, after enumerating specially contempts which fall within the two descriptions, he says generally that they may be committed by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people, and he proceeds to say that the process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves, for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. The power therefore to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal and has been actually exercised as early as the annals of our law extend, and as such, is confirmed by the statute of Magna Charta, and, hence, he concludes that the power is not derived from any statute, not even Westminster II. (13 Edward I.), chapter 39, which was merely declaratory of the law of the land.

Bishop, in his work on Criminal Law (8th Ed.), volume 2, sections 242 and 243, lays down substantially the same doctrine in these words: "It is not possible for any judicial tribunal to fulfill its functions without the power to preserve order, and to enforce its mandates and decrees. And the common and apparently only practical method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every such tribunal, derived from its very constitution, without any express statutory aid. The doctrine is generally asserted in these broad terms, and is believed to be sound; the narrower doctrine, about which there is no dispute, is that this power in inherent in all courts of record. As explained in the first volume, it is a common law offense to obstruct any course of the government or its justice. When, therefore, a man does anything which interferes with the judicial tribunal in the conduct of a cause, he commits an obstruction of a criminal nature. This is a common form of contempt of court."

In *King v. Almon,* 8 State Trials, 53, *Wilmot, C. J.,* says: "The power which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt of the court, acted in the face of it (1 Vent., 1), and the issuing of attachments by the Supreme Courts of justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae,* and within the exception of Magna Charta, as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none; it is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore it cannot be said to invade the common law, but to act in alliance and

friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society." "Every court of record," says Bacon in his Abridgement (Courts, E), vol. 2, pages 633-634, "as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and may immediately order them into custody. The courts of record, as incident to them, have a power of protecting from arrest, not only the parties themselves, but also all witnesses *eundo et redeundo;* for since they are obliged to appear by the process of the court, it would be unreasonable that they should be molested whilst paying obedience to it." 1 Hawkins's Pleas of Crown (8th Ed.), p. 63. *McKean, C. J.,* forcibly summarized the doctrine more than a century ago (1788), in *Respublica v. Oswald,* 1 Dal. (Pa.), 319, when he said: "Some doubts were suggested, whether, even a contempt of the court was punishable by attachment; but, not only my brethren and myself, but likewise all the judges of England think that without this power, no court could possibly exist—nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued. On this point, therefore, we entertain no doubt." It was held in *Cartwright's case,* 114 Mass., 230, that the right summarily to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts as being essential to the exercise of their jurisdiction, to the execution of their powers and to the maintenance of their authority. It is therefore a part of the fundamental law within the meaning and intent of Magna Charta

and the Declaration of Rights in our Constitutions against depriving any person of life, liberty or property, except by the judgment of his peers or the law of the land, and is not contrary to any guarantee of trial by jury or due process of law. The language of the court in *Cooper's case,* 32 Vt., 257, is peculiarly applicable to the facts of our case. "The power to punish for contempt," says the court, "is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business. It represses disorder, violence and excitement, and preserves the gravity, tranquility, decorum and courtesy that are necessary to the impartial investigation of controversy. It secures respect for the law by requiring respect and obedience to those who represent its authority. Its exercise is not merely personal to the court and its dignity; it is due to the authority of law and the administration of justice. The power to punish for contempt is indispensable to the proper discharge of their duties by magistrates. Without it the magistrate would be in a pitiable condition, compelled to hold court, to investigate controversies, examine witnesses and listens to arguments and yet powerless to secure order in his proceedings, to enforce obedience to his decisions, to repress turbulence, or even to protect himself from insult. The mere power to remove disorderly persons from his court room would be wholly inadequate to secure, either the proper transaction and dispatch of business, or the respect and obedience due to the court and necessary for the administration of justice." In *Ex Parte Terry,* 128 U. S., 289, where most of the authorities are collected, the court, affirming the rulings to be found in its earliest decisions, holds that certain implied powers result to courts of justice from the very nature of their constitution, and thus they possess the power to fine for contempt, imprison for contumacy and enforce the observance of

order. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates. The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." The moment that courts are called into existence and vested with purisdiction over any subject, they become invested with this power. This doctrine of the law is well stated in *Clark v. People*, Breese (Ill.), 340, which is also reported in 12 Am. Dec., 177, where will be found a valuable note collating the principal cases on the subject. Rapalje, in his work on Contempts (section 1 and notes), says: "It is conclusively settled by a long line of decisions that at common law, all courts of record have an inherent power to punish contempts committed in *facie curiae*, such power being essential to the very existence of a court as such and granted as a necessary incident in establishing a tribunal as a court." The doctrine has been fully recognized by this court. In *State v. Woodfin*, 27 N. C., 199, *Ruffin, C. J.*, for the court, says: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace in *facie curiae* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact." *Ex Parte Summers*, 27 N. C., 149; *Ex Parte Schenck*, 65 N. C., 366; *Pain v. Pain*, 80 N. C., 322; *In re Oldham*, 89 N. C., 23; *Kane v. Haywood*, 66 N. C., 1. From this doctrine so firmly established

and from the reasoning of the authorities cited in its support, it must necessarily follow that, as the power to attach for a certain class of contempts is inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise. The Constitution provides for a distinct separation of the three coordinate branches of the government and vests the judicial power in the several courts mentioned in Article IV., section 2. It further provides that the General Assembly shall not deprive the judicial department of any power or jurisdiction which rightfully pertains to it. Article IV., section 12. If the power to attach for a direct contempt is inherent in the courts and necessary to their vitality and usefulness, any interference with its exercise which prevents the courts from proceeding against contumacious or disorderly persons must needs be a deprivation of the power. But argument is not required to establish so plain a proposition. Rapalje, at page 13, section 11, says: "In the absence of a constitutional provision on the subject, the better opinion seems to be that legislative bodies have not power to limit or regulate the inherent power of courts to punish for contempt. This power being necessary to the very existence of the court, as such, the Legislature has no right to take it away or hamper its free exercise. This is undoubtedly true in the case of a court created by the Constitution. Such a court can go beyond the provisions of the statute, in order to preserve and enforce its constitutional powers, by treating as contempts acts which may clearly invade them. On the other hand, the Circuit and District Courts of the United States, being the creatures of Congress, their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction." In *Ex Parte Schenck,* 65 N. C., 366, a case which has frequently been cited with approval, and a case, too, in which the validity of

the Act of 1871 was recognized to a certain extent, it is said: "Courts of justice are established by the Constitution, and are invested with certain inherent powers, which are essential to their existence, and of which they cannot be deprived by the Legislature. Their province is to construe existing laws and to administer justice, and they must necessarily have the power by summary remedies to preserve order during their sessions, control the action of their officers, and enforce their mandates and decrees. If the courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes." In *Holman v. State,* 105 Ind., 515, the court states what it declares to be the principle settled by the words of the Constitution as well as by actual decision: "The power," says the court, "to punish for direct contempts is inherent in all courts of superior jurisdiction. This power is not conferred by legislation, but is an inherent power residing in all Superior Courts. It is a power that the Legislature can neither create nor destroy. It is as essential to the preservation of the existence of courts as is the natural right of self-defense to the preservation of human life. The judicial is a co-ordinate department of the government, and courts are not the mere creatures of the Legislature, for, if they were, the judicial department would be a subordinate one, dependent for existence and power upon the will of the Legislature. This is not, as the Constitution expressly declares and the united voice of the courts affirm. As it is a co-ordinate branch of government, and as judicial power can only live in the courts, it must follow that courts possess inherent powers which they do not owe to the Legislature, and among these powers is that of the right to punish direct contempt. This subject has been many times discussed, and the doctrine often affirmed, without diversity of judicial opinion, that courts do possess power to punish contempts independent of legislation, and that this power is one that the Legislature

can neither destroy nor abridge." This court said in *Deaton's case*: "So inherent is the power to attach for contempt, that the Legislature would have no power to deprive the courts of its exercise." And in *Herndon v. Insurance Co.*, 111 N. C., 384, it was held that the Supreme Court was created by and derives its power and jurisdiction from the Constitution. Its mandate comes from the people and the source of its authority is the same as that of the legislative and executive departments. "The same organic law which gives the Legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the executive or of this court, gives the like power over its own procedure to this court, free of interference from either of the other co-ordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional prerogatives of this court." The power of the Legislature to require this court to rehear a case otherwise than is prescribed by its own rules of practice and procedure was denied in that case. The Superior Court, being a constitutional body, must be governed by the same law as this court, and is under the same protection from legislative interference, so far at least as its inherent rights and powers are concerned, which are specially shielded by the Constitution against infringement. *In re Woolley*, 74 Ky., 98; *People v. Wilson*, 64 Ill., 196; *State v. Morrill*, 16 Ark., 384; *State v. Kiser*, 20 Oregon, 56. See also *Scott v. Fishblate*, 117 N. C., 265, in which the inherent power to punish summarily for contempt was said to reside even in a mayor of a town as being necessary to the very existence of the court. The validity of the Act of 1871 was settled by *Ex Parte Schenck*, "with certain savings in respect to the inherent rights of the court," said this court by *Pearson, C. J.*, in *Kane v. Haywood*, 66 N. C., 31. That is, its operation was restricted to those contempts which are constructive and the right to attach for which is not essential to

the full and free exercise of the powers and jurisdiction conferred upon the courts by the Constitution. It would be useless to multiply authorities in support of this reasonable and necessary doctrine that the Legislature cannot deprive the courts of any of their vital powers, such as are requisite for their preservation and for their protection from unlawful interference in the exercise of their jurisdiction and the performance of their judicial functions. The doctrine is recognized as perfectly sound and well settled in all the cases we have cited, and is a logical deduction from the other proposition that the power to attach for contempt is inherent. If, therefore, the Legislature by the Act of 1871 (Code, sections 648-654), had attempted to destroy or abridge this power, it would become our duty to declare the act to that extent void and of no effect.

The Legislature has the same inherent power to preserve order and to attach for any act which tends to interrupt its deliberations and proceedings or which is committed in contempt of its authority, as is vested in the courts. Rapalje, section 2. With the lawful exercise of this undoubted power, the judiciary will not interfere. It is recognized as being necessary to the proper and orderly transaction of its business and is clearly implied from the other powers conferred and duties imposed upon that honorable body, under the elementary and familiar rule that, when a power is given, every other power necessary to its execution is to be considered as also granted. As we will not attempt to restrict or regulate the exercise of this power, and it would not be seemly to do so, we will not assume that the Legislature intended to trench upon the right which inherently belongs to the courts to protect themselves, by punishing those who unlawfully obstruct their proceedings or act in contempt or defiance of their authority.

But fortunately we are relieved from the necessity of deciding the question by the fact that this court has construed

that statute, and held that it "does not take away any of the inherent powers of the courts, which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it to be unconstitutional and void." *Dick, J.,* in *Ex Parte Schenck,* 65 N. C., 368. In view of what the court had before said in that case, which we have already quoted, it must be taken as settled that the Act of 1871, as brought forward in The Code, sections 648-654, is, in respect to the law of contempt, as broad and comprehensive in its scope and meaning as the common law itself, so far as it relates to those "inherent powers of the courts, which are absolutely essential in the administration of justice."

With these observations as to the power of the courts, let us now inquire whether the facts found by the judge and "specified on the record" show that the petitioner has committed a contempt, within the meaning of the Act of 1871 and the common law, for which he could be summarily punished. There is no case to be found precisely like this one in all of its facts and circumstances. Insults to judges and assaults upon them, while in the discharge of their official duties, in resentment for some imagined grievance growing out of their official action have been so rare, be it said to the credit of a law-abiding and law-respecting people, that it is difficult to find an exact precedent for our ruling in this matter, but authority is abundant in support of the principle upon which our decision must rest. If the respondent has not committed a contempt of court for which he can be summarily punished, we might well join with *Lord Langdale* in his assertion that without such a power in the court, "it will be impossible that justice can be administered. It would be better (in such circumstances) that the doors of justice were at once closed." *Littler v. Thompson,* 2 Beavan, 129. He was there speaking of an attack upon a party to a cause then

pending. How much more aggravated is one made upon the presiding judge of the court. The same idea is advanced in *Ex Parte McLeod,* 120 Fed. Rep., 130, a case much like ours in its facts, if it does not fully cover the very question here involved. It there appeared that a commissioner had been assaulted by a party of whom he had required an appearance bond. With reference to these facts, it was substantially said that, as courts can exercise judicial functions only through their judicial officers, an assault upon such an officer because he has discharged a required duty is necessarily an attack upon the court for what it has done in the administration of justice. It is vital to the welfare of society that courts, which pass upon the life, liberty and property of the citizen, be free to exercise their reason and conscience unawed by fear or violence; and the highest considerations of the public good demand that the courts protect their officers against revenges induced in consequence of the performance of their duties, as well as violence while engaged in the actual discharge of duty. It is a high contempt of court to seek to punish a judicial officer for his official act, elsewhere than before a constitutional tribunal of impeachment. The evil is that the judge has been held to accountability for his judicial acts and punished contrary to the law because he has performed them. That acts like this, which degrade the judicial office, unfit the incumbents for calm deliberation, awe them in the exercise of their functions, and undermine their independence, must recoil fearfully on the orderly and decent administration of justice, cannot be denied. Who would have any respect for the authority of a court whose judge, the moment he left the court house, could be subjected with impunity to insult and assault because of acts done in his judicial capacity while on the bench? Is it in the power of any person, by insulting or assaulting the judge because of official acts, if only the assailant restrains his passion until the judge leaves the court building, to compel the judge to

forfeit either his own self-respect and the regard of the people by tame submission to the indignity (without summarily arraigning the culprit), or else set in his own person the evil example of punishing the insult by taking the law into his own hands? If he forbears for the time and resort to the criminal law, the remedy is hardly better than the wrong, since then he must become a private prosecutor in some other court and depend on it to vindicate the independence of his own.

We will now refer to a case which at least one eminent judge has pronounced to be "the ablest case on the law of contempts to be found in the books." *Hammond, J.,* in 120 Fed. Rep., at p. 772. It is the case of *Commonwealth v. Dandridge,* 2 Va.., cases 408. The respondent who was interested in the event of the suit, then pending in the court over which the judge presided, met the latter on the steps of the court house as he was returning from his chambers to open court and grossly insulted him, charging him with corruption in the trial of the case. The court was not actually in session but in recess. It was adjudged to be a contempt for which summary punishment could be inflicted. "Judicial independence," says the court by *Dade, J.,* "has been an object of constitutional care in this country. In the origin of this government it was thought expedient to make that department independent even of the executive and legislative branches, who are not presumed to do wrong; and shall it be said that it is wholly unnecessary to make it independent of the passions and prejudices of all who may conceive themselves injured by its legitimate proceedings? Shall a judge be called independent who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentment of those upon whose interests he has to act, and be reduced to the alternative of either submitting tamely to contumely and insult, of resenting it by force or resorting to the doubtful remedy of an action at law? In such a state

of things it would rest in the discretion of every party in court to force the judge, either to shrink from his duty or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To assume that the personal character of the judge would be a sufficient guarantee against this, is to imagine a state of society which would render the office of the judge wholly unnecessary." In another part of the opinion, this able and scholarly judge said: "When I see the juror and the witness protected from insult for what they may have said or done in court, I ask whether it is more necessary to defend these characters, who may perhaps never be again called into a court of justice, than the judge, who must be so often exposed to similar trials. When in all these cases I find the great object to be the preservation of the authority, dignity, impartiality and independence of the judiciary, without which it has been said it could not exist, or if existing would be a curse rather than a blessing, I cannot feel justified in excepting a case which is in all its particulars in direct hostility to this principle, because I cannot back my opinion by a reported case." After citing Blackstone and numerous other authorities he proceeds: "With this array before our eyes, can it be credited that it should be so highly penal to assault or abuse a judge in court for his judicial proceedings, and no offense to do the same thing to him the moment after his leaving the bench, on account of the same provocation? Can it be considered a matter of so much consequence to protect the person of the suitor, the lawyer, the witness, the juror and the jailer, and none to defend the judge? Not that I mean to arrogate any higher personal privilege for the judge than for the humblest of these, but because it is obvious that the principle which suggests the necessity for protecting them rises with the grade of the officer, and that the majesty of the laws may be more degraded in the person of the highest than of the lowest officer

intrusted with their administration." *Judge White,* who wrote a separate concurring opinion, answers the argument there made by the respondent's counsel, and now advanced in this case, in very forceful words: "It is contended that in general and upon principle no contempt can be committed in any court unless it be in session at the time, and the contempt be committed in its face. And that no contemptuous words spoken to or of a judge, during the recess or vacation of his court, however deeply they may implicate his judicial conduct, can be thus punished. The argument upon this point was specious and imposing. Whether it was substantially correct, and whether the result endeavored to be produced by it be in accord with either the public good or the great principles of law long since established (not for the private gratification of the judges, but to insure the well being of society) is another question—a question of solemn import to every man who looks to the laws of his country for the preservation of all he holds dear. We cannot prostrate the courts of the country at the feet of every disappointed suitor who may happen to lose his cause, or whose conduct may necessarily elicit from a judge observations unpleasant to his feelings, without the most fatal consequences. Nay, destroy the protection which the law now gives to your court, unloose the hands and tongues of such persons, expose your magistrates to their abuse, contumely and vituperation for their judicial conduct without any immediate and efficacious means of restraint, and instead of that happy, dignified and peaceful state of society which we now enjoy, we shall soon find that we have neither laws nor magistrates; and let it be remembered that in this country we ought not to have, we have not, any privileged order of men. If one man is restrained from such conduct, every man must be subject to a like restraint. If one man is at liberty to pursue it, every other man must enjoy the same liberty."

We might well stop here and rest our decision upon the

reasoning in that case and the deduction of that able court that in such a case as the one there and here presented, an attachment for a direct contempt will lie and punishment can be summarily imposed. But we are impressed and the court was in that case, with the great importance of the question which induces if it does not require us, especially in view of the ability and zeal with which counsel have argued before us, to investigate fully this doctrine of attachment for contempt and deliberately and maturely weigh the reasons for and against it, aided by the learning we find in the books, to the end that our conclusion may be formed after the most careful thought and deliberation, and with due regard for the maintenance of the rightful powers of the courts as well as the preservation of the personal liberty of the citizen. If, in an attempt to do this, more time is consumed than we could wish, an apology will be found in the desire we have to reach a just and safe conclusion.

When we use the term "attachment for contempt" it must be understood that we refer to the summary proceeding and not to the remedy by citation or rule to show cause when the contempt is indirect or constructive and the offense can now be punished only "as for a contempt," as provided by the statute, Code, section 654. With this explanation of a term we proceed to the further discusison of the authorities.

In *U. S. v. Anonymous*, 21 Fed. Rep., 761, where the question here involved is examined at great length in a well considered opinion by *Judge Hammond*, who reviews the cases with marked discrimination and sustains his views by the most cogent reasoning, it is held that "where the act or conduct takes the form of an assault upon an officer, as when he was beaten and made to eat the process and its seal, the impediment to the efficient administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him.

Be this as it may, wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, yet, because of the direct injury it does in obstructiong the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be." This is a very important case and a strong authority, as in it the court construes the Act of Congress of 1831 upon the subject of contempts, which greatly limited the power of the Federal Courts to punish summarily for contempts and confined it to misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, and misbehavior of the officers of the court and disobedience or resistance to its process. The act, if anything, is more restricted in its provisions that our statute, Code, sections 648-654, and yet it was held in the case cited that it was not necessary that the offensive act should have been committed in the immediate presence of the court while actually sitting in the court house with the judge on the bench, but though merely constructive because of the place where it is committed, it becomes a thing done *in facie curiae* within the meaning of the statute, if it affects an officer in the discharge of his duty and directly tends to obstruct the proceedings of the court or the administration of justice. It is generally understood that the object of the act of Congress was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the Federal Courts, their officers and proceedings. *U. S. v. Anonymous,* 21 Fed. Rep., at p. 768; *Ex Parte Poulson,* 19 Fed. Cases No. 11,350; *Cuyler v. Railroad* (*In re Danicls*),

131 Fed. Rep., 95. In other respects the common law prevails as it did under the Act of 1789, as to all contempts committed in the presence of the court. Cases *supra.*

In *U. S. v. Patterson,* 26 Fed. Rep., 509, where it appears the respondent had assaulted an attorney in the court room during the recess of the court, it was held that he could be attached for contempt, the court assigning the following reason: "The mistake of the respondent was in assuming that when the judge left the bench, he might, so far as the court was concerned, proceed to accomplish his purpose of making the assault, supposing that it was only when the judge was on the bench that any question of contempt could arise. But it must be apparent to every one that this is a misconception, and far too restricted to admit of approval anywhere. The court would deserve the contempt of public opinion if it permitted so narrow a view of its prerogatives to prevail, and could not complain if during its recess the court room should be used for a cock pit or a convenient place to erect a prize ring. That is the logic of the false assumption that was made in this case. But wholly aside from this consideration, there is a principle of protection to all who are engaged in and about the proceedings of a court that requires preservation against misbehavior of this kind. The defendant in court whose attorney was attacked is entitled to the protection of the court against any personal violence towards its attorney, while he is in attendance on the court. Otherwise, attorneys might be driven from the court or deterred from coming to it, or be held in bodily fear while in attendance, and thereby the administration of justice be obstructed. This principle might be pressed beyond reasonable limits, to be sure, but it certainly is not going beyond the true confines of the doctrine to apply it here. It protects parties, jurors, witnesses, the officers of the court and all engaged in and about the business of the court even from the service of civil process while

in attendance, and certainly should protect an attorney at the bar from the approach and attack of those who would do him a personal violence. A former ruling of this court on that subject has been especially approved by very high authority."

Lord Cottenham committed to the Fleet for contempt a barrister who was also a member of Parliament and who had threatened a master in Chancery with a view of inducing him to reverse his decision, upon the ground that his conduct tended to pervert the course of justice and to obstruct its due administration. This ruling was approved by the House of Commons upon the report of its Committee of Privileges, and the claim to be discharged by reason of privilege was disallowed. A like decision was made by *Lord Eldon,* when a witness was interfered with, in *Ex Parte King,* 7 Vesey (ch.) 315; and also in *Ex Parte Burrous,* 8 Vesey (ch.) 535, when violence was committed in one of the offices of the court, though not in its immediate presence. The Court of Chancery in *Williams v. Johns,* 2 Dickens, 477, attached the defendant for having compelled the officer, who had served him with a subpœna, to eat the same and otherwise ill treating him. In each of these cases the offense was regarded as a criminal contempt by reason of its direct tendency to thwart the administration of justice, as much so as if it had been committed in the very "face of the court." It was held in *State v. Garland,* 25 La. Ann., 532, that the use of abusive language towards a member of the court and an assault upon him during a recess, and in the court room, under the pretext of resenting what he had said or done when on the bench, was a direct and aggravated contempt of the court for which he could be summarily punished, and in *Baker v. State,* 82 Ga., 776, it was held that a court was not dissolved by a mere recess or necessary adjournment from one day to the next, and misbehavior affecting public justice in the court room and in the immediate presence of the judge

during such a recess, and whilst he is attending there to resume business but before the hour of recess has expired, was a contempt committed in the presence of the court and punishable summarily. The court, by *Bleckley, C. J.*, said: "What right did he, the respondent, have to discuss his case if the court was not in session? And what right did he have to do it in an improper manner if it was in session? It was urged in the argument before us that he was merely complaining to the judge, and in so doing was in the exercise of a legal right. But what law confers on a suitor the right to converse about his case with the judge out of court? Are the State's judges to be questioned by suitors about their cases and listen to complaints elsewhere than in court? We think not. The office of judge would be intolerable to the holder and degrading to the State, were the incumbent subjected by law to personal and private approach, questioning and harassment at the will of anxious and discontented suitors. The only place for intercourse with a judge, touching business pending in court, is the place where the court sits, and the only time for it is during the sitting."

In *People v. Wilson*, 64 Ill., 195, it is held that the power to punish for contempts is an incident to all courts of justice, independent of any statutory provision. Referring to the statute of that State attempting to restrict the power of the courts in this respect, it was further held that if the statute should be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, yet in this power would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice, and such acts would be considered as done in the presence of the court. See also on the subject of contempts not committed in the court room, *Ex Parte Savin*, 131 U. S., 267; *In re Cuddy*, *ibid.*, 280; *In re Healey*, 53 Vt., 694; *Littler v. Thompson*, 2 Beavan, 129; *In re Bary* (note), 10 Fed. Rep., 630; *Wel-*

lesley's case, 2 Rus. & Mylne, 639. In *Rex v. Wigley,* 7 Car. & P., 4 (32 E. C. L., 415), it appeared that a witness in a prosecution, tried at the King's Bench sittings, struck the defendant after the trial was over, when both were in the lobby of the court. The witness being brought to the bar and evidence given of these facts, the judge (*Coleridge*) committed him to the custody of the marshal for three days for this contempt of the court. So in the case of *In re Pryor,* 18 Kan., 72, the facts were that an attorney had sent to a judge, out of court, a letter of an insulting character and containing an imputation upon his integrity with reference to a cause which was being tried before him, and it was held to be a contempt of court and one which could be summarily punished. "If the language or conduct of the attorney is insulting or disrespectful," says the court by *Brown, J.*, "and in the presence, real or constructive, of the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt." In *Savin's case* and in *Cuddy's case, supra,* the offense was not committed in the immediate presence of the court, but in a room in another part of the court house, which was held to be within the precincts of the court and in its constructive presence and the offender therefore subject to summary punishment. 131 U. S., 267 and 280.

A case more like ours perhaps than any other is that of *State v. Steube,* 3 Ohio C. C., 383, first heard below and then on appeal, the full report of which is not accessible to us. The facts appear to have been that, during a recess of the court, the prosecuting attorney was without provocation assaulted by a witness in a criminal case then pending, he being also a defendant in a like case not yet called for trial. The assault was made at a place about five blocks from the court house and grew out of the attorney's conduct in the pending case. The statute of Ohio provides that a person, guilty of misbehavior in the presence of a court, or of a judge

at Chambers, or so near as to interrupt the proceedings or to obstruct the administration of justice, may be punished summarily. It was held that the case was within the terms of the statute and the respondent was properly punished in a summary manner. Another case very similar in its facts is *In re Brule,* 71 Fed. Rep., 943, in which it appeared that the respondent had bribed a witness at the latter's residence. The court held that, even within the words of the act of Congress, it was a direct and not a constructive contempt for which summary punishment could be meted out. It cites and relies on *Savin's* and *Cuddy's cases,* among others, and pertinently inquires "if it is a contempt to bribe a witness in front of the court house, is it not a contempt to attempt to do the same thing on the street opposite the court building or even four blocks away? Is not the result the same? Is not the motive of the accused the same?" How, we ask, can the mere element of distance change the character of the act or take from it the quality of being a direct offense against the authority of the court and a palpable obstruction to the administration of justice? A ruling which would ignore the complete identity of the two kinds of offenses would sacrifice the substance to the form. *Qui haeret in litera haeret in cortice.* In *Ex Parte Summers,* 27 N. C., 149, an officer had refused obedience to an order to return process in his hands, and accompanied his refusal with an insolent message to the court. Commenting on these facts, the court, by *Ruffin, C. J.,* said: "But had there been no legal default, and admitting that this person might have insisted before the court, on the delay of the return to the next day as his absolute right, yet the message to the court, in its terms and manner, *and while he was in the verge of the court* (italics ours), was as offensive and disrespectful as it could be, and in itself justified the fine."

We have thus reviewed at much length the authorities bearing either directly or indirectly upon the important and

delicate questions under consideration and have found abundant support, as we think, for the conclusion we have reached, that within the meaning of our statute, Code, sections 648-654, the conduct of the respondent was a direct contempt of the court, as much so as if the assault had been made when the judge was sitting on the bench in open court. The insult was given and the assault made "within the verge of the court," as aptly expressed by *Chief Justice Ruffin* in *Summer's case.*

It may well be doubted if the case of *In re Gorham,* 129 N. C., 481, is not in conflict with that of *In re Oldham,* 89 N. C., 23, and does not virtually overrule it, though it may not in terms have done so. Indeed we doubt if the *Oldham case* can well be sustained in view of the principles herein stated and the authorities relied on. The court, in that case, held that there was no contempt at all and that the offense could only be punished by indictment, while in *Gorham's case* it was held that the attempt to corrupt a juror could be punished as for a contempt, it being an unlawful interference with the proceedings of the court in an action, which tended to defeat, impair, impede or prejudice the rights of a party thereto, within the meaning and intent of The Code, section 654, subsection 3, and section 656, the only difference between the two cases being that, in *Oldham's case,* the offense consisted in handing to a person summoned as a juror printed circulars containing matter calculated to prejudice the jurors against the defendant, in a cause then pending, with a request that he would distribute them among the jurors during the term, while in *Gorham's case,* the offense was committed during the term, though in the recess of the court. We perceive no practical difference between the two cases. Indeed, we think that in both cases, if the respondents were not guilty of a contempt, under section 648 of The Code, which could have been punished summarily, because of the direct interference with the proceedings of the court and contempt of its

authority, continuing to the very moment of the trial of the cases, Oldham, as well as Gorham, was at least guilty under section 654, subsection 3, and section 656, upon the facts found and stated in the record. What difference can there be, under the latter section, between corrupting jurors during the term of the court and unlawfully influencing one of their number before the term, with the understanding that he will in turn influence his fellows during the term to decide a particular way? *Qui facit per alium, facit per se.* Does not the one as directly tend to pervert or defeat the administration of justice as the other, and is not the one as much a contempt of the authority and dignity of the court as the other?

In both classes of contempts, the punishment is of the same kind, a fine not to exceed two hundred and fifty dollars and imprisonment not to exceed thirty days, but in direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus,* while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal.

The statute provides (section 648) that direct contempts shall consist in "disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority," and "any breach of the peace or noise or other disturbance tending to interrupt the proceedings of any court," and these and other acts and neglects, not necessary to be here mentioned, are declared to be the only acts and neglects which shall be the subjects of contempt of court. Tested by reason and authority, we think the statute must be so construed as to embrace the case presented in this record. If we thought otherwise and that resort to the common law

is necessary to protect the judge from insult and to shield him against assault for his judicial acts, we would not permit the statute to stand in our way. As said by the present Chief Justice in his concurring opinion in the case of *In re Gorham,* 129 N. C., 491, with reference to this very statute: "It cannot be justly imputed to the General Assembly that it passed an act intended or so worded as to justly mean that the administration of justice can be defeated, impaired and impeded. Were it possible that such an act had been passed, it would be our duty to declare it unconstitutional and with as great reason as the court has ever done so in any case." And in this connection, other words of his in that opinion are equally applicable to the facts of this case as they were to the case then being decided: "The contempt," he says, "could not be more direct or palpable if a band of armed men had followed the jury to the court house with threats of violence if their verdict was unfavorable, and had stood just outside the door to execute punishment if disappointed. It is equally a contempt of court whether a man meets a juror just outside the court house with a bribe or a bludgeon in his hand. If the court cannot prevent either because not done within the court room, the administration of justice is no longer free. The independence of the judiciary no longer exists." While this court will always be disposed to safeguard the personal liberty of the citizen and enforce all constitutional guarantees in his favor even to the extreme limit, it must at the same time look to its own preservation, as the power of the court to protect itself is a part of the supreme law, and the corresponding duty plainly enjoined to exercise this power, whenever necessary, is as imperative if not as mandatory as any other obligation resting upon it under the Constitution. The courts derive their authority and jurisdiction from the people through the organic law, and the respect of the people for and their confidence in their judges are absolutely essential to the maintenance of that

power and authority. They are the foundation upon which the whole fabric rests, and whoever impairs either of the former to that extent threatens the very existence of the latter. In *Durham v. State,* 6 Iowa, 254, it is well said that the power given to the courts to punish for contempts is not alone for their own protection, but also for the safety and benefit of the public. The life, liberty and property of every citizen are preserved and the true welfare of society insured and promoted in the preservation of this power in its proper vigor and efficiency.

We conclude the discussion with the language of *Chancellor Kent,* when speaking of the exemption of a judge from civil liability for his judicial acts, which is peculiarly applicable to this case, as the prosecution of a judge for a wrong, alleged to have been committed in the execution of his office, is assuredly less harmful than an unprovoked assault upon his person. "Whenever," said the chancellor, "we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible, and we thereby embolden the licentious to trample upon everything sacred in society and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty." *Yates v. Lansing,* 5 Johns, 282.

The cases cited by the petitioner's counsel are not in point. *Delafield v. Construction Co.,* 115 N. C., 21; *Hinton v. Ins. Co.,* 116 N. C., 22. The judge had not left the bench for the term, as in those cases it appeared he had done, but by express direction the court was kept open for the transaction of other business, the signing of the minutes and some unfinished matters.

Having disposed of the legal questions involved, we cannot take leave of the case without commending the able and fearless judge who presided in the Superior Court for the

perfect control and complete mastery of himself, which he exhibited under most trying and exasperating circumstances. His subordination of self, in deference to the dignity of his high office, is worthy of the highest praise and must command at once for him the respect, confidence and admiration of all. It was the best tribute he could have paid to the judiciary and the most perfect example he could have presented to the people of one of their chosen representatives in judicial station, who, tested by the severest ordeal, admirably sustained its dignity and by his own submission and self-restraint enhanced the respect due to the power and the majesty of the law. Guided by the same spirit which prompted Lord Coke's simple but impressive answer to his king, when he was asked by him out of court and in advance, what his opinion, as Chief Justice, would be concerning the extent of the royal prerogative, we can safely expect that whenever occasion requires "he will always do that which shall be fit for a judge to do." In the proceeding before him, and he was the proper and indeed the only judge to initiate it, he was fully within the pale of his jurisdiction, and in all respects has proceeded in accordance with the law and in a most exemplary manner has vindicated the dignity and authority of his court.

The opinion in this case is not intended, nor must it be construed, as approving what is said in the authorities cited, where they go beyond what is actually necessary for the decision of this case. Whether it is a direct contempt to insult or attack a judge for any of his official acts after the court has adjourned for the term, is a question which, with others of a like character, is not presented and not within the scope of this decision. We pass upon what is now before us; nothing more.

We have not discussed the questions raised below as to the proper method of bringing a decision in *habeas corpus* proceedings into this court for review, whether by direct appeal

or writ of *certiorari*, as all irregularities have been fully waived. *In re Briggs*, 135 N. C., 118. The matter is mentioned in the hope that the law upon this subject may be made clear by legislative enactment, as there seems to be no speedy and at the same time adequate remedy in such a case. In some instances, although they may be rare, it might be proper to allow bail, but this is a matter which addresses itself to the wisdom of the Legislature and does not fall within our province.

There is no error. The petitioner will pay the costs of the proceeding, including the costs of this court.

No Error.

CORPORATION COMMISSION v. RAILROAD.

(Filed September 26, 1905).

Corporation Commission, Powers and Rules of—Carriers—Track Scales—Evidence.

1. The Legislature has the power to supervise, regulate and control the rates and conduct of common carriers, and this regulation may be exercised either directly or through a commission.

2. Under the act creating the Corporation Commission, it has the power to require a railroad to put in track scales at such points as the quantity of business may justify it.

3. This power cannot be unreasonably exercised, and such orders are subject to review by the Superior Court and by this court.

4. The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in.

5. Where there was evidence that the defendant had put in track scales at other points where fewer car loads were shipped, and that the petitioner paid annually $30,000 in freight and that the defendant offered to put them in if the petitioner would pay higher rates (amounting annually to $950, nearly the full cost of scales and of putting them in,) than was paid by shippers at points where scales had been put in, *held*, that the evidence was sufficient to be submitted to the jury, on the reasonableness and necessity of the order.

6. The fact that the petitioner would cut and ship lumber only two more years from that point does not *per se* make the order unreasonable, when the petitioner had already shipped from that point for five years and had ten years' cutting at another station on the defendant's road, to which the scales could then be moved.

7. It is not the number of shippers, but the number of car loads to be weighed which is the test whether it is reasonable to have facilities for weighing car loads upon track scales at a station, and it is immaterial that the petition affected only one point and one shipper.

ACTION by State *ex rel* North Carolina Corporation Commission against the Atlantic Coast Line Railroad Company, heard by *Judge M. H. Justice* and a jury, at the November Term, 1904, of the Superior Court of WAKE County. From the judgment rendered, the plaintiff appealed.

Attorney-General and *F. A. Woodard* for the plaintiff.
Junius Davis and *Pou & Fuller* for the defendant.

CLARK, C. J. A petition was filed before the Corporation Commission by the Dennis Simmons Lumber Company, whose plant is located at Elm City, asking that the defendant be required to put in track scales for weighing lumber shipped in car load lots from that point. It was in evidence that the defendant had such scales at twenty-one other points on its North Carolina and Virginia division, at which there were saw mills, among them Weldon, Tillery, Parmelee,

Washington and Rocky Mount; that on the lumber shipped by the plaintiff at Elm City it paid $30,385 freight in 1903, being more freight than was paid on car load shipments at several points where the defendant had put in such scales; that the scales, if put in, would cost the defendant about $1,000; that the defendant offered to put in such scales if the plaintiff would add one-fourth of a cent per 100 pounds to its present rate of eight cents, which would cost the plaintiff very nearly $950 additional per annum; that there was very little car load freight, requiring the use of such scales, shipped from Elm City except that shipped by the petitioner, and that the plaintiff had now to ship its lumber unweighed, and would pay freight upon its estimated weight which would be corrected when the lumber was later weighed at Rocky Mount or Pinner's Point, at which places en route the defendant had track scales; the plaintiff objected to this latter arrangement because it gave it no opportunity to see to the correctness of the weighing, and gave in evidence of serious inaccuracies in the weights as thus made elsewhere and reported to them.

Upon the above evidence the Corporation Commission found the facts in accordance therewith and ordered that "the defendant furnish track scales at Elm City for the purpose of weighing all car load shipments from that point." Upon appeal by the defendant to the Superior Court, the evidence was substantially the same except the additional fact that the petitioner expected to get through cutting timber at Elm City in two years, when its plant would be removed to Kenly, another point on the defendant's road, where it would have ten years' cutting, and the scales could be removed to that point for the same use. The plaintiff tendered the following issues:

1. Is it reasonable that the Atlantic Coast Line Railroad Co. be required for the convenience of shippers of freight to put in track scales at Elm City?

2. Are track scales a necessary convenience for the use of shippers of freight at Elm City?

At the close of the plaintiff's evidence the defendant offered no evidence, but demurred to the plaintiff's evidence. The plaintiff asked the court to instruct the jury to answer both issues "yes." To the refusal of the court to submit the issues tendered and also to the refusal to instruct the jury as prayed, the plaintiff excepted. The court held with the defendant on the ground as stated in the judgment that the Corporation Commission "had no power under the law to make the order appealed from, sustained the demurrer on that ground and reversed the judgment" of the Corporation Commission.

There was error in the judgment that the Corporation Commission "had no power under the law to make the order appealed from." The power of the Legislature to supervise, regulate and control the rates and conduct of common carriers has come down to us from the remotest times of the common law, and that this regulation may be exercised either directly or through a commission has been repeatedly held by this court and by the Supreme Court of the United States. *Railroad Connection Case*, 137 N. C., at p. 15, and cases there cited. The contest here is simply and substantially a reiteration of the issue in that case, which is whether the State, through its Corporation Commission, has power to exercise a "general control and supervision or railroads" within this State in their dealings with the public.

Section 1 of the act creating the Commission provides that it "shall have such general control and supervision of all railroads * * * companies or corporations engaged in the carrying of freight or passengers * * * necessary to carry into effect the provisions of this act." Section 2 empowers and directs the Commission "to make just and reasonable rules and regulations for the handling of freight and baggage at stations." Section 17 provides that "all railroad

companies in this State shall on demand issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped and the freight charges over the road giving the receipt."

A literal compliance with the last clause would require on demand of the shipper that the articles shipped be weighed in every instance, that the shipper may see for himself what he must pay. But inasmuch as at many stations the quantity of freight shipped in car load lots would make it an unnecessary burden to require at such points means of weighing car loads to ascertain the freight to be charged, the Corporation Commission, under the further clause, section 2 (12), to "require depot accommodations commensurate with the business and revenue" has not required track scales at all points, but has made reasonable rules for regulating, by a standing estimate, the weight in car load lots of different articles shipped from such stations. But this is not in derogation of the right and duty of the Commission to require track scales or other proper facilities for weighing car load freight to be put in at such points as the quantity of business may justify it. The Commission can order new depots (Laws 1899, ch. 164, section 2 (12)), established wherever they are needed, *R. R. Co. v. Minn.*, 193 U. S., 63, and of course has the lesser power to require proper facilities at those already established. This subsection provides that the Commission may require "the erection of depot accommodations commensurate with such business and revenue."

The traffic manager of the defendant on the trial before the Corporation Commission, in his evidence, rested his opposition largely upon the ground that he "did not wish a precedent set that the Corporation Commission could order track scales put in anywhere, because they might order them at points where the business would not justify it." His defense and the judgment below are to the same effect, i. e., a denial of the power of the Corporation Commission to require

such accommodations to be rendered the public. But this is error. The power does exist. It cannot be unreasonably exercised, and such orders are subject to review by the Superior Court and by this court. The court should have left the reasonableness of the order to the jury upon proper instructions as to the law. The ruling that the Commission "had no power" to make such orders deprived the complainant of any opportunity of presenting his contentions as to the reasonableness of the order for review. The traffic manager's view (which was sustained by the court below) leaves such orders absolutely to the railroad's own will and pleasure, and if its refusal is unreasonable and unjust, there would be no correction.

It was precisely for this reason that the Corporation Commission was created, an impartial body representing neither the shipper nor the railroad, to supervise and control the operations of these great corporations that justice may be done shippers and the public by reasonable orders and requirements, such orders being subject, if unreasonable, to review by the same tribunals which protect and safeguard the lives, the liberty and the property of every citizen in the land —the courts with their juries and judges. It is in this way that a demand like that made by the petitioner in this case shall be held reasonable or unreasonable, and not by the arbitrary and irreviewable decision of the defendant. It would be as just to place the granting of the demand in the irreviewable power of the shipper as to give the refusal of the request to the other party. The Corporation Commission was created as an impartial tribunal to decide such matters, "to have general control and supervision of all railroad * * * companies or corporations, and of all other corporations engaged in carrying freight or passengers." "Track scales" are not specifically mentioned in the act, but there is the power to "require depot accommodations commensurate with the business and revenue" at the respective stations and

to require "repairs or additions" to any station, "the removal or establishment of a station," the raising or lowering the tracks, etc., to promote the "convenience or accommodation of the public." There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons, which such Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial Commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts instead of leaving such dealings to the unrestricted will of one party—the carrier.

This appeal rests solely upon the denial of power to make any order in the premises. It cannot be said that there was no evidence tending to show that the order was reasonable. The defendant had put in track scales at other points where fewer car loads were shipped. It offered to put in the scales if the petitioner would pay higher rates (amounting annually to nearly the full cost of scales and of putting them in), than was paid by shippers at points where such scales had been put in. Indeed this was a discrimination against the petitioner. The petitioner had for five years been denied its request for like facilities with the stations shipping less lumber, and it should not be deemed unreasonable *per se* to order such facilities because only two years remained. Besides, the defendant could remove the scales when no longer needed. At least, there was evidence to submit the reasonableness of the order to the jury. Under the statute "depot accommodations should be commensurate with the business and revenue." Certainly it would have been a discrimination to have required, as the defendant proposed, that the defendant would put in the scales in consideration of adding one-fourth cent to the rate of 8 cents per cwt., now charged the

petitioner, being about $950 per year for weighing (as was the defendant's duty) the petitioner's lumber. The petitioner was not unreasonable in asking that the lumber be weighed there instead of at Pinner's Point, especially in view of the admission that the weights at the latter point, as reported thence, had varied near 25 per cent. per car load on the same class of lumber.

The defendant pressed the point that this petition "affected only one point and one shipper," and was, therefore, a discrimination. All such petitions and orders must necessarily apply to the one station where the additional facility is demanded. If the defendant itself was passing upon the application it would only consider the necessity for it at that point. It would be unreasonable to the defendant to apply such order to all stations. Nor is it material to the defendant that the $30,385 freight was paid on car load lots shipped by one shipper, there being only 42 car loads shipped by others. It is not the number of shippers, but the number of car loads to be weighed which is the test whether it is reasonable to have facilities for weighing car loads upon track scales at that point. The petitioner itself consists of several persons. It is not to be discriminated against because it is a corporation.

We were more inclined to be impressed with the argument that the petitioner would only cut lumber two years longer at that point, but on the other hand the petitioner had already shipped lumber from that point for five years, during much of which time they had been in vain asking this facility that they might see their lumber weighed and the freight for the two years to come to be paid by the petitioner would be over $60,000, which would well seem to justify the furnishing track scales at a cost of one thousand dollars (which the defendant had put in at several points making smaller shipments), especially taken in connection with the further evidence that the petitioner has ten years' cutting at Kenly,

another station on the defendant's road, to which the track scales can then be moved, if the car load shipments at Elm City will not justify keeping them there.

It was error to hold that the Corporation Commission "had no power" to make the order, and it was also error to refuse to submit to the jury the issues tendered by the plaintiff as to the reasonableness of the order and the necessity for such appliances for shippers of freight at Elm City.

Not only was the plaintiff's request to submit issues as to the reasonableness and necessity for the order refused by the court, but the court did not pass upon them itself, for, instead of ruling upon the defendant's demurrer to the evidence upon its merits, the court held *ex mero motu* that the Commission had no jurisdiction of such cause of action and no cause of action was stated, for it reversed the order on the ground, as stated in the judgment, because "the Corporation Commission had no power to make the order applied for." If such ruling was error, we must so hold, for it is the only question presented by the appeal, and the case must go back that the court or the jury, upon proper instructions, as the case may be, may pass upon the reasonableness and necessity of the order in controversy. This is not the case where a demurrer to the evidence is sustained on the merits, but, here, the ruling that the Corporation Commission had no jurisdiction because of want of power, in fact cut the court off from any ruling upon the demurrer to the evidence.

It may be that upon the reinstatement of the case and trial, the defendant may be able to put in evidence presenting sufficient reasons why the order sought is not reasonable and just, or in the lapse of time since, the timber may have been cut off so that the scales are not needed (if so, of course, a nonsuit will be taken), or it may be that the petitioner or others at that station may have acquired timber making the scales necessary. These will be appropriate matters to put in evidence at such trial (if the application for the order is

not withdrawn), but do not affect the sole point before us, which is as to the power of the Corporation Commission to make the order. The ruling in effect was that there was a defect of jurisdiction in that the Corporation Commission had no power to make such order, and was

Error.

BUNN v. BRASWELL.

(Filed September 26, 1905).

Mortgagor and Mortgagee—Possession by Mortgagor—Statute of Limitations—Consent Judgments.

A consent judgment providing that the defendant has an equity to redeem the land upon the payment to the plaintiff of $600, on or before the first day of October next, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under section 152 (3) of The Code, ten years' possession of the defendant, after default, bars the plaintiff.

ACTION by Anna B. Bunn against L. C. Braswell and others, heard by *Judge W. R. Allen,* upon an agreed statement of facts, at the May Term, 1905, of the Superior Court of NASH County.

At the October Term, 1888, of the Superior Court of Nash County, N. W. Boddie recovered judgment by default against Exum Braswell, adjudging him to be the owner and entitled to the possession of the tract of land in controversy. At the Spring Term, 1889, upon a motion to set the judgment aside, it was, by consent, adjudged "that said judgment is so far

modified as to declare that the defendant has an equity to redeem the land described in the complaint upon the payment to the plaintiff of six hundred dollars and interest from date, and the cost of this action, on or before the first day of October next, and if this payment is made in full on or before that day, the plaintiff will convey the said premises to the defendant, but in case of his failure to make such payment within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate or interest in the premises. The former judgment, however, remains in full force so far as it declares that the plaintiff is the owner and entitled to the possession of said land, and if necessary the clerk will issue a writ of possession." Exum Braswell remained in possession until his death, when the defendant who succeeded to such possession and rights as he had, continued therein until the institution of the action and other proceedings set forth in the transcript. Upon the death of N. W. Boddie, his rights in respect to said land vested in the plaintiff. On the 14th day of April, 1900, a civil action was instituted in the Superior Court by Mrs. L. C. Boddie, who then represented the title of N. W. Boddie, deceased, against Exum Braswell. In the complaint filed therein the plaintiff avers ownership in herself and wrongful possession by defendant. At the Spring Term, 1900, judgment by default was entered. At the Spring Term, 1901, the heirs at law of Braswell were permitted to come in and make themselves parties defendant; the judgment was set aside and defendants allowed to file answer. They answered, averring that the judgment of Spring Term, 1889, in the original action, was a final settlement of the rights of the parties, and that the terms thereof were complied with by Exum Braswell, by paying the sum therein adjudged to be due N. W. Boddie. They also pleaded the ten years' statute as a bar to the action. On the 29th day of November, 1901, upon application of the plaintiff, the

clerk of the Superior Court of said county made an order directing that a writ of assistance issue upon the judgment of Spring Term, 1889; pursuant thereto such writ was issued to the sheriff of said county, commanding him to eject the defendants from said land and put the plaintiffs in possession thereof. The defendants thereupon made a motion before the said clerk to withdraw said writ for that more than ten years had elapsed since the rendition of said judgment—that no execution had issued thereon—that no notice had been given of the motion for the issuance of said writ; that the judgment was barred by the statute of limitations. The plaintiffs, respondents to said motion, filed answer to the affidavit upon which the motion was made, admitting the matters of record and denying that the possession of the defendants or their ancestor was or had been adverse to the plaintiffs. The said answer set forth "that the relation established by the judgment (of Spring Term, 1889,) between the plaintiff and defendant was that of mortgagor and mortgagee, with the mortgagor in possession and clothed with the right to redeem under said decree of strict foreclosure." That the heirs of Exum Braswell took subject to the rights of N. W. Boddie. The clerk withdrew the writ, and plaintiff appealed to the judge. The original action and appeal coming on for hearing, by consent, the two records were consolidated and heard at the May Term of Nash Superior Court, where judgment was rendered for plaintiffs, to which defendants excepted and appealed. No evidence of payment of the $600 was introduced.

F. S. Spruill for the plaintiff.
Austin & Grantham for the defendants.

CONNOR, J., after stating the facts: There is nothing in the complaint filed in the action of Fall Term, 1888, to indicate the source or quality of the title of N. W. Boddie.

The judgment of Spring Term, 1889, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement of the parties made a matter of record by the court at their request. *Gaston J.*, in *Wilcox v. Wilcox*, 36 N. C., 36, says that a consent judgment "is the decree of the parties." *Dillard, J.*, in *Edney v. Edney*, 81 N. C., 1, says: "A decree by consent is the decree of the parties put on file with the sanction and permission of the court; and in such decrees the parties acting for themselves may provide as to them seems best concerning the subject matter of the litigation." *Vaughan v. Gooch*, 92 N. C., 524.

The judgment is therefore to be construed in the same way as if the parties had entered into the contract by writing duly signed and delivered. The plaintiff in her answer to the motion to withdraw the execution contended that the relation established between the parties, by the judgment, was that of mortgagor and mortgagee—the defendant being the mortgagor in possession. The defendants in this court make the same contention, while the plaintiff here insists that the judgment established the relation of vendor and vendee—the vendee being in possession. The learned counsel calls our attention to the provision that the plaintiff is declared to be the owner of the land, and upon payment of the amount fixed is directed to convey it to the defendant. This, he insists, excludes the idea that the defendant was the owner and the plaintiff the mortgagee. There is certainly much force in this view. On the other hand, the defendant's counsel, in their well considered brief and excellent oral argument, contend that the declaration that the defendant "has an equity to redeem the land," shows clearly that the relation of mortgagor and mortgagee at that time and theretofore, existed between the parties, and not that he was, by the judgment, given such equity; that the judgment was a recognition of the existence thereof. They further insist that the term "equity to redeem" is well defined and applicable to

no other relation than that of mortgagor and mortgagee. From this position counsel contend that, notwithstanding the provision in the judgment that upon failure to pay the amount fixed by October 1, 1889, the defendant shall be forever debarred and foreclosed of any equity, etc., in said lands, the relation continued to exist and that after default the possession of the defendant continued to be that of mortgagor and not tenant, and that at the end of ten years the plaintiff was barred by subsection 3, section 152 of The Code. This defense is not based upon the idea that the possession of Braswell was adverse to the plaintiff. It is conceded that the authorities cited by plaintiff in her answer to the motion to withdraw the execution, sustain the position that the possession of the mortgagor is not adverse to the mortgagee. *Parker v. Banks,* 79 N. C., 480. The plaintiff contends that after default, the defendant was the tenant of the plaintiff, at sufferance and that, until by some unequivocal act on his part, the character of his tenure could not be changed. We do not think that in any aspect of the case the question of adverse possession arises. It has been found difficult to define, satisfactorily, the tenure of the mortgagor in possession. *Rodman, J.,* in *Jones v. Hill,* 64 N. C., 198, said: "If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case, the mortgagor has sometimes been called a tenant at will or sufferance, and sometimes a trespasser; but he is properly neither; his position cannot be more accurately defined than by calling him a mortgagor in possession, but he may be ejected at any time by the mortgagee without notice." Do the terms of the judgment of Spring Term, 1889, establish the relation of mortgagor and mortgagee? In discussing the character of an instrument involving the same question, *Ruffin, C. J.,* said: "The case is not free from doubt upon the first point. The character of the conveyance is to be determined by the intention of the parties, and if that,

however ascertained, was that it should operate as a security, the court so regards it and the debtor will be entitled to redeem." *Gillis v. Martin,* 17 N. C., 472.

In *Wilson v. Weston,* 57 N. C., 349, the deed provided, "The said Wilson shall have the privilege of redeeming * * * by paying the said Weston * * * the said sum of $35, on or before the expiration of six months." *Ruffin,* J., said: "There may be in some cases much difficulty in distinguishing between a mortgage and a conditional sale; but there are very decisive evidences of the true character of this transaction. The deed of itself, imports *prima facie* a security and not a sale—by the proviso for the privilege of redeeming the negroes, which, between these parties, is equivalent to a technical condition on which an equity of redemption would arise, as denoting the intent of the parties." *Mason v. Hearne,* 45 N. C., 88; *Robinson v. Willoughby,* 65 N. C., 520, *Rodman, J.,* saying: "If a transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem; such a case being on grounds of equity an exception to the maxim '*modus et conventio vincunt legem.*' It is to be regretted that for the purpose of aiding us in construing the terms of the contract, or agreement, of the parties, as embodied in the consent judgment, we have no evidence or information in regard to the status of the title prior to the judgment of Fall Term, 1888. The defendants, in their affidavit made before the clerk, say that Exum Braswell, their ancestor, owned and had possession of the land since 1833. Whether Mr. Boddie ever owned the land or how he acquired a right to it, or to have $600 paid him as a condition upon which he was to convey it to Braswell, does not appear. The term "right to redeem," is appropriate to express the right, interest or estate of a mortgagor, and not a vendee. When we speak of the interest of one in, or right to, real estate, as an "equity of redemption," which is synonymous with "right

to redeem," we understand that reference is made to the status of a mortgagor—not a vendee. We are also impressed with the expression that the defendant "*has* a right to redeem;" the language clearly conveys the idea that some such relation, in respect to the land, then existed between the parties. The judgment of Fall Term, 1888, is not inconsistent with the suggestion that the plaintiff's title was not absolute, but subject to the right to redeem. The judgment of Fall Term, 1888, and the consent judgment when read together, as they should be, to ascertain the intention of the parties, is consistent with the contention of the defendant. *Watkins v. Williams,* 123 N. C., 170. The mortgagee is the owner, and in an action for that purpose entitled to the possession of the mortgaged estate. Upon a careful consideration of the terms of the consent judgment, in the light of the authorities, we are of the opinion that the relation of mortgagor and mortgagee was recognized, or at least established. The plaintiff insists that, conceding this to be true, the judgment expressly declares that upon failure to pay the debt on or before October 1, 1889, the defendant shall be barred and foreclosed of his right or equity to redeem. That by this provision in the judgment there was a strict foreclosure. That after the day fixed, the default of the defendant deprived him of any and all interest in the land. In that view his possession was either adverse, in which case the plaintiff would not be barred until the expiration of twenty years or the possession was permissive, and no length of time would bar the entry of the plaintiff. Treating the judgment as the agreement of the parties, in what respect does it differ from a common law mortgage, in which it is always provided that upon default "the said deed and every part thereof shall remain in full force and effect?" It was to prevent the hardship growing out of the forfeiture wrought by the terms of the deed in a court of law that equity came to the relief of the mortgagor and permitted him to redeem, notwithstand-

ing the forfeiture, by paying the debt within a reasonable time. In this way the right to redeem came into existence and from this purely equitable right—or right to relief in equity—was evolved the mortgagor's equity of redemption which came to be and is now recognized as an estate or interest in the land, subject to sale under execution, to dower and many other incidents of a legal estate in land. Courts of equity, for the purpose of preserving without impairment this right to redeem notwithstanding the forfeiture, refused to recognize or enforce agreements, made at the time of the execution of the mortgage, releasing or in any manner depriving the mortgagor of his equity. From this refusal of the chancellors, the maxim came into existence, "Once a mortgage always a mortgage," which has been strictly adhered to by the courts in England and this country, so that it is a well settled doctrine that by no agreement made by the parties can the equity of redemption be destroyed. While in exceptional cases the court would render a decree of strict foreclosure, it was only done where it clearly appeared that the rights or interest of the mortgagor were not injuriously affected. *Ruffin, C. J.*, in *Gillis v. Martin, supra*, after holding that the instrument before the court was a mortgage, said: "But no agreement at the time of the contract, that the purchaser shall, in default of the debtor, become absolute owner even at an increased price, is permitted by the court to bar redemption, if the subject was once redeemable." The principle is strongly stated by *Mr. Justice Field* in *Peugh v. Davis*, 96 U. S., 332: "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates.

Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity and thus prevent the condition from being enforced and the property sacrificed." In *Macauley v. Smith,* 132 N. Y., 524, *Landon, J.,* said: "The agreement to turn a mortgage into an absolute deed in case of default is one that finds no favor in equity. The maxim 'once a mortgage always a mortgage' governs the case." In Jones on Mortgages, vol. 1, section 251, it is said: "Generally, every one may renounce any privilege or surrender any right he has; but an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money." This court has always rigidly enforced the maxim invoked by the defendants. *Ruffin, C. J.,* in *Fleming v. Sitton,* 21 N. C., 621, speaking of the parties in foreclosure suits, says: "Of late years a beneficial practice has gained favor until it may be considered established in this country not absolutely to foreclose in any case, but to sell the mortgaged premises and apply the proceeds in satisfaction of the debt." Jones on Mortgages, section 1538 *et seq.* Treating the consent judgment as the agreement of the parties rather than the judicial determination of their rights, we are brought to the conclusion that, notwithsanding the provision of strict foreclosure, the relation of mortgagor and mortgagee continued to exist between them. The question next arises whether the plaintiff is barred by the statute of limitations. Prior to The Code, a presumption of abandonment arose which precluded a mortgagee from maintaining a bill to foreclose a mortgage after ten years from default, when the mortgagor was permitted to remain in possession, making no payment on the debt, *Brown v. Becknall,* 58 N. C., 423, because, as said by *Pearson, C. J.,* "One who sleeps on his right for ten years either has arranged it in some way or ought to lose it

because of his negligence." By section 152, subsection 3, an action to foreclose a mortgage is barred after ten years from the forfeiture, when the mortgagor has been in possession of the property. The condition which formerly raised a presumption of abandonment, now constitutes an absolute bar to the enforcement of the mortgage. It would seem, therefore, that the plaintiff can neither have a writ of possession upon the consent judgment nor maintain an action of ejectment for the land. It may be that the plaintiff may be able to show a payment on the debt or other recognition of it, preventing the operation of the statute. The case was heard by His Honor upon the record. The judgment must be reversed and the case remanded with permission to the plaintiff, if so advised, to amend her complaint by asking for a decree of foreclosure by a sale of the property. The defendants may then interpose such defenses as they may be advised, so that the rights of the parties may be settled in accordance with this opinion. It is so ordered.

Error.

CARRAWAY v. LASSITER.

(Filed September 26, 1905).

Sale of Land for Assets—Executors and Administrators—Parties—Appointment of Guardians ad litem—Powers of Court—Purchasers at Judicial Sales—Caveat—Fraud.

1. The approval by the judge of the clerk's findings of fact is conclusive, unless the exception, for that there is no evidence to sustain them, can be sustained.

2. A person indebted cannot, by devising his lands, upon contingent limitations to parties not *in esse*, prevent their sale for payment of his debts until all who may by possibility take are born or every possible contingency is at an end.

3. In a special proceeding by an executor to sell the lands of his testatrix to make assets to pay her debts, a devisee (without children), to whom the entire estate was given for life, remainder to such children as she might leave surviving, and in default of issue to an asylum, represented the entire title for the purpose of enabling the court to proceed in the cause, and children thereafter born to her are bound by the judgment.

4. The Superior Court has, independently of The Code, the power to appoint a guardian *ad litem* for an infant defendant, and it may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person, and the clerk who acts as and for the court may do the same in special proceedings pending before him.

5. In a special proceeding by an executor to sell lands, the clerk has power to appoint a guardian *ad litem* for an infant defendant, where the executor was the general guardian of such infant.

6. Where a petition for license to sell land was filed on October 12th, and the clerk, on the 15th day of the same month and before any summons was issued, made an order appointing a guardian *ad litem*, this was irregular, but the service of process upon the infant defendant and the guardian *ad litem*, followed by the filing of an answer by him, cured the irregularity in the order of appointment.

7. In the absence of fraud, a purchaser at a judicial sale, is only required to see that the court has jurisdiction of the person and the subject matter for his protection.

8. The failure to appoint a guardian *ad litem* of a minor husband does not affect the validity of a decree of sale of land, where such husband had no interest in the land, his wife having but a life estate.

9. In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by section 2160 of The Code, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected.

10. The fact that litigation was pending in regard to the title to a portion of the land sold, and that by reason thereof and the pendency of a caveat, persons were restrained from bidding for the land, would not constitute ground for setting the judgment, etc., aside; such matters could only be considered in a separate action to attack the proceeding and sale for fraud.

THIS is a motion in the cause, by G. W. Carraway and wife against T. U. Lassiter and others, to set aside an order of sale and the decree of confirmation, made in a special proceeding lately pending in the Superior Court of GREENE County, heard by *Judge Henry R. Bryan*, at Chambers, at New Bern, on the 6th day of January, 1905, upon appeal from certain findings and orders of the Clerk of the Superior Court. From a judgment approving and confirming the findings of fact and the orders of the clerk, the plaintiff appealed.

G. M. Lindsay and *A. D. Ward* for the plaintiffs.

Galloway & Albritton and *Jarvis & Blow* for the defendants.

CONNOR, J. This case, entitled in the transcript sent to this court, "*Carraway v. Lassiter*," is a motion in a cause lately pending in the Superior Court of Greene County, in

which R. L. Davis, executor of L. V. Whitehead, is plaintiff (petitioner), and Geo. W. Carraway and wife, Inez, and others, are defendants. The plaintiff, R. L. Davis, executor, instituted the original proceeding by filing a petition in said court in the usual form, asking for license to sell a portion of the lands of his testatrix to make assets to pay her debts, etc., pursuant to sections 1436 *et seq.* of The Code. The record contains over two hundred pages of printed matter, a large portion of which is irrelevant and immaterial. The facts, as we gather them from the petition, answer and findings of the clerk, material to a decision of the questions raised by the exceptions of the petitioners, are: Mrs. L. V. Whitehead, late of the county of Greene, died on the 14th day of December, 1895, seized and possessed of a plantation in said county containing 1100 acres, known as the "Streator Place." She left a last will and testament devising and bequeathing her entire estate, real and personal, to her granddaughter, Inez, for life, remainder to such children as she might leave surviving, and in default of issue, to the Oxford Orphan Asylum—naming R. L. Davis executor and guardian to her said grandchild, who was then a minor. The said will was duly admitted to probate in common form and the said Davis duly qualified as executor thereto. He was also appointed and qualified as guardian to the said Inez. Thereafter a caveat to said will was filed by the next of kin and the issue raised duly docketed in the Superior Court of Greene County, on the — day of March, 1896. At the time of her death the said L. V. Whitehead was indebted in an amount exceeding $4,000, the payment of which was secured by mortgages on the said land. On or about the 12th day of October, 1896, the said Davis, executor, filed his petition in the Superior Court of said county containing the averments prescribed by the statute and asking for an order to sell 846 acres, being a portion of said land. The remaining portion contained the dwelling house and improvements. The said

Inez had, prior to the filing of said petition and during her minority, intermarried with Geo. W. Carraway, who was also a minor, being about twenty years of age. Upon the filing of said petition, it appearing that the said Davis was both executor and guardian, he asked that some suitable person be appointed guardian *ad litem* for his ward, etc. On the 12th day of October, 1896, and before any summons had issued, the clerk made an order appointing T. E. Barrow guardian *ad litem* for said infant defendants. The petition named as defendants the said Inez and her husband, J. L. Wooten and wife, who held mortgages on said land, and the Orphan Asylum. On October 15, 1896, the clerk issued a summons directed to the sheriff of said county commanding him to summon the defendants, Inez and her husband, J. L. Wooten and wife, the Orphan Asylum, and the said T. E. Barrow, guardian *ad litem,* to appear and answer the petition on the 6th day of November, 1896. The petition is lost and the facts in regard thereto are found by the clerk upon the affidavits of the former clerk and the attorney who filed the same. The order appointing the guardian *ad litem* and the summons are in the judgment roll. The sheriff made a return of said summons, stating that he had served the same on the defendants, Carraway and wife, by reading it to them, and on T. E. Barrow, guardian *ad litem*, by delivering a copy. The summons on J. L. Wooten and wife was served by the sheriff of Pitt County. There is no record of any service on the Orphan Asylum. On the return of the summons the said guardian *ad litem* filed his answer, drawn by the clerk and signed by said guardian, admitting the allegations of the petition. This paper is lost. On November 6, 1896, the clerk made an order, reciting that proper service of the summons had been made on all the parties defendant and that the guardian *ad litem* had filed an answer, directing "the sale of the land described in the petition," after duly advertising the same, and that the executor make report to the court, etc.

This order is on file. The said executor filed his report, stating that pursuant to said order (inadvertently referring to it as having been made on November 13) he had sold the lands on December 7, 1896, at public auction at the court house door in Snow Hill, after duly advertising the same, and that T. U. Lassiter was the last and highest bidder at the sum of $4,000, which was a full and fair price therefor; that he was ready to comply with his bid, etc. The executor recommended that the sale be confirmed. On December 18, 1896, the clerk made an order confirming said sale in which it was recited that due and legal service of summons was made on all of the defendants and that they had admitted in their answers the allegations of the petition, etc. He directed the executor to collect the purchase money and make title to the purchaser. The purchaser paid the purchase money and the executor executed to him a deed for said lands, dated the 30th day of December, 1896, which was recorded on the 30th day of December, 1897. The order of confirmation was approved by the resident judge of the district on December 26, 1896. The clerk finds that the attorney for the petitioner did not have any conversation with the guardian in regard to his appointment or the preparation or filing of his answer. Nor did the petitioner attempt to use any undue influence to induce him to accept the guardianship. That said T. U. Lassiter was a *bona fide* purchaser of said land for full value and without any notice of any irregularity, if there was any, in the special proceedings under and by virtue of which the land was sold. That the sale was fair and open, and the land brought its full market value at the time of sale. That Lassiter had no notice of any irregularity in the proceeding or of any cloud upon the title, nor of any other matter or thing, if there was any, which prevented him from getting a good title. That he bid on said land at the urgent request of Geo. W. Carraway, husband of Inez, and that he became the purchaser, believing that he would

get a good title under the decree of the court. That the personal estate of the said L. V. Whitehead was insufficient to pay her debts; that it was necessary to sell the land for that purpose. That the petition set out a description of the portion of the land to be sold. The petition contains a number of allegations and records referring to litigation pending in Pitt County at the time of her death, by and against Mrs. Whitehead, in regard to her property. It is charged that one of said actions affected the title to a portion of the lands sold by the executor. It also appears that on April 12, 1897, Lassiter sold and conveyed to R. L. Davis 330 acres of the Streeter Place for about $5 per acre. There is no evidence tending to show any agreement prior to or at the time of the sale or during the pendency of the proceeding between Davis and Lassiter in regard to the purchase of any portion of the land by Davis. They both expressly deny any such agreement. It appears that prior to December, 1897, the said Geo. W. Carraway, having attained his majority, qualified as guardian of his wife. At the December Term, 1897, R. L. Davis, executor, the said Carraway and wife, and Carraway as guardian, were made parties to one of the actions pending in Pitt Superior Court, and that they were also parties to an action pending in Greene Superior Court. At the time the petition was filed by R. L. Davis, executor, Mrs. Carraway had no issue. A child was born to her on November 18, 1896; the said child died in its infancy. Davis, executor, filed his final account November 7, 1899, showing the receipt and disbursement of the proceeds of the land sold by him. On the 7th day of November, 1904, this petition was filed by Geo. W. Carraway and wife and their children, all of whom were born subsequent to the final decree in *Davis, Ex., v. Carraway*. The purchaser, Lassiter, and R. L. Davis filed their answers to said petition and the motion was heard by the clerk upon the petition, answers, affidavits and oral testimony. He found the facts as set forth and refused the

motion. The petitioners noted a number of exceptions to the rulings of the clerk and appealed to the judge of the district, who overruled the exceptions, approved the findings of the clerk and affirmed his judgment. Petitioners excepted and appealed.

The petitioners except to a number of the clerk's findings for that there is no evidence to sustain them. The approval by the judge of the findings is conclusive, unless the exceptions can be sustained. We have read with care all of the affidavits, exhibits and admissions. In our opinion there is not only evidence to sustain the clerk, but in respect to the most material matters it is ample and uncontradicted. The exceptions cannot be sustained. In regard to the compromise of the litigation respecting Mrs. Whitehead's estate, the record shows that prior to the settlement, the husband of Mrs. Carraway had qualified as her guardian and had been made a party thereto, together with his wife; that all parties were represented by learned and eminent counsel. The judgment of compromise indicates a careful regard for the rights of all parties. We find nothing in the record to sustain the suggestion that the debts paid by the executor from the proceeds of the land were not *bona fide* or the mortgages valid. The final account of the executor shows that they were paid and the estate duly and honestly administered. These matters are material only upon the assumption that the proceedings under which the land was sold are irregular, in which event it would be proper to inquire whether the petitioners show such merit as make it the duty of the court to set aside the judgments rendered in the cause. *Stancill v. Gay*, 92 N. C., 455. It appears that since the filing of this petition, Mrs. Carraway has died. The petitioners are not parties to the original proceeding; they claim title to the land as remaindermen after the termination of the life estate of Mrs. Carraway under the will of Mrs. Whitehead. If, as they contend, they are not bound by the judgment, they may not be heard

to attack it. *Hinsdale v. Hawley,* 89 N. C., 87; *Knott v. Taylor,* 99 N. C., 511. Being of opinion, however, that they are bound, we proceed to consider their exceptions. If the proceeding had been one in which the life tenant had for any proper reason, invoked the aid of the court to sell the land, as for partition, only those who were parties, either personally or by representation, would be bound by the decree. The proceeding is based upon the theory that the executor is by order of the court selling the lands of his testatrix which are subject to the payment of her debts, and the devisees or heirs at law are brought in that they may show cause why he may not have license to do so. If the petitioners had been *in esse* at the time the proceeding was instituted, it would have been necessary to divest their interest, to make them parties. It cannot be that a person indebted may, by devising his lands, upon contingent limitations to parties not *in esse* prevent their sale for payment of his debts until all who may by possibility take are born or every possible contingency is at an end. Mrs. Carraway, for the purpose of enabling the court to proceed in the cause, represented the entire title, and children thereafter born to her are bound by the judgment. The child born November 18, 1896, pending the proceeding but after the decree of sale, died in infancy and took no interest which could be affected by the sale. The petitioners contend that, under the terms of the statute, Code, section 181, the clerk had no power to appoint a guardian *ad litem;* that such power is given only where the infant defendant has no general guardian. Their counsel contends that the clerk in respect to this proceeding derives his authority from the statute and is restricted to its terms, differing in that respect from the Superior Court, which has a general jurisdiction confined only by express limitations. The general principle is correct and has been so held by this court in the cases cited and relied upon. We think that the construction contended for is too narrow. Certainly the Superior Court has, inde-

pendently of The Code, the power to appoint a guardian *ad litem* for an infant defendant. It may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. We can see no good reason why the clerk who acts as and for the court may not do the same in special proceedings pending before him. The object to be obtained is the protection of the infant, whose interest is the special care of the court; the guardian *ad litem* is the officer of the court, and we can see no good reason or conflict with well settled principles why it may not for any good reason appoint such guardian. We find no authority in this State, but in *Townsend v. Tadant,* 33 Cal., 45, the question was considered. The administrator who filed the petition in the probate court for a sale of the lands of his intestate was also guardian of the infant heir at law. The court said, "Schollenberger could not represent both sides of the record at the same time. The minor heir then, having no guardian *quoad* the petition, it became the duty of the court before proceeding to act to appoint some disinterested person his guardian for the sole purpose of appearing for him and taking care of his interest."

The only serious question of law presented by the exceptions is whether the court acquired jurisdiction of the person of Inez Carraway. The petition was filed on or about the 12th day of October, 1896, and the clerk on the 15th day of the same month, and before any summons was issued, made an order appointing a guardian *ad litem.* This was certainly irregular, and if not cured would have been fatal to any further proceeding. Clark's Code, section 181, and cases cited. The clerk on the same day issued summons which was duly served upon the infant defendant and her husband and the guardian *ad litem.* This certainly brought her into court, as it did the guardian prematurely appointed. He filed his answer and the court upon the return day proceeded to judg-

ment. The petitioners earnestly contend that the failure to observe the proper order is fatal and renders all further proceedings void. If the petitioners are correct in this contention on the facts appearing of record, they insist the purchaser was fixed with notice and cannot avail himself of the defense that he was a purchaser for value and without notice, notwithstanding the recital in the judgment of sale that "proper service of summons having been made on all parties defendant." We have carefully examined the cases relied upon by petitioners and find that the court has, in cases wherein the proceedings were instituted since the adoption of The Code, set aside judgments, etc., when no service of process was made upon the infants and refused to do so when the infant was in court notwithstanding irregularities in the proceeding. In *Moore v. Gidney*, 75 N. C., 34; *Gulley v. Macy*, 81 N. C., 356; *Young v. Young*, 91 N. C., 359; *Stancill v. Gay*, 92 N. C., 462, no summons was served on the infant defendant, guardians *ad litem* were appointed without personal service on the infants and filed answers. This court has in such cases invariably held that the court acquired no jurisdiction. When, however, personal service was made on the infants, a contrary ruling has been made. In *Howerton v. Sexton*, 90 N. C., 581, *Smith*, C. J., says, "While it must be conceded that there is a want of precision and a great disregard of form manifested in the record, they are not in our opinion sufficient to invalidate the sale made under the order of the court, in the absence of evidence of any fraudulent practice in bringing it about, and when it plainly appears to have been to the interests of all to have the sale confirmed."

In *Williamson v. Hartman*, 92 N. C., 239, it appeared that while there was personal service on the infant there was none on the guardian *ad litem*, nor was any answer filed by him. Upon a motion to set the judgment aside, this court, by *Merrimon*, J., said: "This, however, does not imply that every judgment affected in any degree directly or indirectly by

some or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action or the proceedings in it * * * Whether the court will or will not grant such a motion in any case must depend upon a variety of circumstances and largely upon their peculiar application to the case in which the motion shall be made." *White v. Morris,* 107 N. C., 92. In *Ward v. Lowndes,* 96 N. C., 367, it is said: "This statute (section 181) should be strictly observed, but mere irregularities in observing its provisions, not affecting the substance of its purpose, do not necessarily vitiate the action or special proceeding or proceedings in them. The substantial purpose of this statute is to have infants in proper cases made parties defendant, have them make proper and just defense and to have their rights protected, and to this end have guardians make defense for them." *Fowler v. Poor,* 93 N. C., 466. Without undertaking to cite all of the many cases found in our reports involving the questions presented by this appeal, we are of the opinion that the service of process upon the infant defendant and the guardian *ad litem,* followed by the filing of an answer by him, cured the irregularity in the order of the appointment. Certainly, no harm came to the infant by reason of the irregular method pursued. At most, it was an irregularity and the adjudication made by the clerk that process had been duly served, if conceded to be erroneous, was not void—the parties were certainly at that time in court. The purchaser might with safety rely upon that judgment, followed by the approval of the proceedings before the payment of his money by the resident judge of the district. That the purchaser is only required to see that the court has jurisdiction of the person and the subject matter is for his protection, in the absence of fraud, is settled by abundant authority. *Williams v. Johnson,* 112 N. C., 424. The petitioner states the fact that the husband of Mrs. Inez Carraway was a minor of about the age of

twenty years, and that no guardian *ad litem* was appointed for him. This fact was not brought to the attention of the court. We do not think that the failure to appoint such a guardian affects the validity of the decree. He had no interest in the land, his wife having but a life estate. It would have been an idle thing to have two guardians *ad litem* in the record.

The petitioners further insist that by reason of the pendency of a caveat to Mrs. Whitehead's will, the executor had no power or authority to file the petition or proceed with the sale of the land. It will be observed that the will had been proved in common form and Davis duly qualified. The Code, section 2160, provides that when the caveat has been filed and issue made, the clerk shall further issue an order to the personal representative to suspend all further proceedings, etc. It does not appear that any such order was made. In the absence of such order, we do not think that the acts of the executor were void or that the rights of purchasers could be affected. But it is insisted that other litigation was pending in regard to the title to a portion of the land sold, and that by reason thereof and the pendency of the issue of *devisavit vel non* persons were restrained from bidding for the land. If this were true it would not constitute ground for setting the judgment, etc., aside. Such matters could only be considered as evidence in a separate action brought to attack the proceeding and sale for fraud by showing that the purchaser was cognizant of the facts and took some unfair advantage of them. The affidavit of the purchaser shows that he bid at the sale at the solicitation of the husband of Mrs. Carraway and his and affidavits of several other persons present and bidding show that these facts were not known to them and did not affect their bids. Being of the opinion that the court acquired jurisdiction of the person and subject matter and complied substantially with the requirements of the statute, we cannot conclude that the proceedings, judg-

ment, etc., are void. Before the parties were in court no order was made affecting their rights and thereafter the proceeding was in all respects regular. In this view of the case we do not deem it necessary to consider many other questions discussed by counsel—such as the effect upon the purchaser's rights of the adjudication that the process was duly served, etc.

In sustaining the action of the clerk in this case we do not wish to be understood as encouraging or giving our sanction to the method of procedure adopted in the proceeding. The statute and rules for the guidance of courts in acquiring jurisdiction of the persons and estates of minors and all subsequent proceedings in such cases are mandatory and should in all cases be observed not only for the protection of the parties to the proceeding, but of purchasers at judicial sales. It is to be regretted that records constituting important links in the chain of titles are so frequently lost. The statutes prescribe the manner in which records shall be kept. These mandatory provisions of the law should be observed. It also contemplates that a minute docket of all special proceedings shall be kept, in which it shall be noted, at the time, all steps taken from the issuance of the summons to and including the final decrees. It also contemplates that all orders, judgments and reports in the cause shall be spread upon the record. While, in accordance with a wise policy, the courts, in the absence of fraud, uphold judicial sales when attacked for irregularities, it is not because the law looks upon the order in which such proceedings are conducted as unimportant. It appears from the record in this case that the proceedings antedate the term of the present clerk.

After a careful consideration of the entire record and the briefs of counsel, we find no error in the judgment. It must be

Affirmed.

HUGHES v. WAREHOUSE CO.

(Filed September 26, 1905).

Guaranty—Demurrer.

Where the defendant, in reply to plaintiff's letter of inquiry about W, stated that "we regard W as a reliable and trustworthy gentleman with whom your samples and sales would be entirely safe, and doubly so as all tobacco of yours that might be shipped would come direct to our warehouse, and payment for all such tobacco would be made by us to you for all sales," *held*, the defendant's demurrer on the ground that the letter did not constitute a guaranty was properly sustained.

ACTION by W. T. Hughes & Co. against The Peper Tobacco Warehouse Co., heard by *Judge C. M. Cooke* upon the pleadings, at the January Term, 1905, of the Superior Court of FRANKLIN County. From a judgment sustaining the demurrer, the plaintiff appealed.

F. S. Spruill and *W. H. Ruffin* for the plaintiff.
T. W. Bickett and *S. P. Galt* for the defendant.

CLARK, C. J. This action is upon an alleged guaranty, as proof of which the plaintiff relied upon the following letter:

ST. LOUIS, Mo., March 19, 1897.

Messrs. W. T. Hughes & Co., Louisburg, N. C.:

GENTLEMEN:—Your letter of the 11th inst., making inquiry about the general standing of J. E. M. Walker, received. We regard him as a perfectly reliable, trustworthy gentleman, with whom your samples and sales would be entirely safe and doubly so as all tobacco of yours that might

be shipped would come direct to The Peper Tobacco Warehouse Co., and the payment of all such tobacco would be made by us to you for all sales. Yours truly,

NICHOLAS N. BELL, *Manager,*
per HALL.

Bell was manager of the defendant company. The defendant demurred, giving as its first ground that the letter did not constitute a guaranty, and hence the plaintiff's complaint did not set forth a cause of action, and the court below so held.

We do not think that this letter constituted a guaranty by the defendant to Hughes & Co., of payment of all tobacco which they should ship J. E. M. Walker. A guaranty is a contract, an *aggregatio mentium.* This letter is on its face merely a response to a letter of inquiry to ascertain the general standing of J. E. M. Walker, and not to a request for them to guarantee purchases made by him. The reply contains what was asked for information and nothing more. This reply states that the defendant "regarded" Walker as a reliable and trustworthy gentleman, with whom Hughes & Co.'s samples and sales would be entirely safe, and doubly so because Hughes & Co.'s tobacco would come direct to the defendant's warehouse and payment for all sales of such tobacco would be made by the defendant to the plaintiffs. This was merely a statement of the defendant's opinion of Walker's reliability and of the manner in which the defendant would handle the tobacco and the additional safety this method would be to the plaintiff. Besides, there was no consideration for the guaranty. The tobacco was already being shipped to the defendant for Walker as it would seem from the letter, and there certainly is no agreement shown to so ship, nor an indication of any benefit to accrue to the defendant. Neither in the letter nor in the attendant circumstances is there anything to justify holding this letter to be a guaranty. The

purport of the letter depends upon its intent, as derived from its perusal; and cases cited upon the construction of other papers, differently worded, could be of no assistance to us.

As the letter is not a guaranty, it becomes entirely unnecessary to consider the other exceptions. The judgment sustaining the demurrer is

Affirmed.

HAWKINS v. LUMBER CO.

(Filed September 26, 1905).

Deeds—Timber Contracts, Construction of—Repugnant Clauses.

1. Growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property.

2. Where a deed conveys all timber now standing or which may be standing on certain lands during the period of fifteen years from and after the time when the grantee shall begin to cut and remove said timber, and the time in which to begin to cut and remove said timber is not limited, and provides by a subsequent clause that the grantor assures unto the grantee the full term of fifteen years, as above set forth, within which to cut and remove the timber hereby conveyed, *held*, that the instrument conveys a present estate of absolute ownership in the timber defeasible as to all timber not removed within fifteen years from the time of commencing to cut, allowing a reasonable time to begin such cutting. (The opinion in *Mfg. Co. v. Hobbs*, 128 N. C., 46, criticised).

3. That part of the deed giving an unlimited time to cut and remove the timber will be rejected because it is indefinite and repugnant to the first part of the stipulation as to time, and because it is contrary to the intent and purpose of the parties as indicated by the entire instrument.

HAWKINS *v.* LUMBER CO.

ACTION by John L. Hawkins against Goldsboro Lumber Co., pending in the Superior Court of JONES County, heard by *Judge Jas. L. Webb,* at Chambers, at New Bern, on April 14, 1905, upon motion of the plaintiff to continue to the hearing a restraining order theretofore issued. From a judgment continuing the restraining order to the hearing, the defendant appealed.

Civil action to enjoin defendant from cutting timber on land claimed by plaintiff. The defendant seeks to justify under a deed from plaintiff J. L. Hawkins to J. W. Smith and John P. Moore, dated February 25, 1893, and, second, a deed from Smith and Moore to W. A. Winsatt, and a license from Winsatt to defendant. The judge below heard the evidence and found the facts to be, first, that the instrument of writing under which defendant claims title to the timber in controversy was executed on February 25, 1893; second, that defendant did not begin to cut the timber until March 29, 1905, and thereupon declared the following conclusions of law: "Upon this finding, the court is of opinion, as a matter of law, that the said instrument of writing, under which the defendant claims his right to cut the timber, is void for uncertainty; and for the further reason that the defendant and those under whom it claims failed to begin to cut the timber in dispute within a reasonable time from the date of the execution of the deed, February 25, 1893, and adjudged that the restraining order theretofore issued be continued to the hearing." Defendant excepted and appealed.

D. L. Ward for the plaintiff.
A. D. Ward and *T. C. Wooten* for the defendant.

HOKE, J., after stating the case: The rights of the parties to this controversy were made to depend on the true construction of the deed from plaintiff to Smith and Moore, dated February 25, 1893, and the fact that no cutting was

commenced until March 29, 1905. The effective words of the instrument as to the interest conveyed are as follows: "Do give, grant, bargain, sell and convey unto the said parties of the second part, their heirs, executors, administrators and assigns, all the timber of every kind and description of and above the size of 12 inches in diameter at the base, two feet above the ground, when the same is cut, now standing or growing or which may be standing or on the herein described land during the period of fifteen years from and after the time when said parties of the second part, their heirs, executors, administrators and assigns shall begin to cut and remove said timber, and commence to manufacture the same into wood or lumber, and the time in which to begin to cut and remove said timber shall be and is not limited: To have and to hold said timber as specified and described, together with all the privileges and rights of way hereinafter granted unto the said parties of the second part, their heirs, executors, administrators and assigns; and the parties of the first part hereby grant and assure unto the parties of the second part, their heirs, executors, administrators and assigns, the full term of fifteen years as above set forth within which to cut and remove the timber herein conveyed, with the exclusive privilege of entering upon said land with servants and tenants for the purpose of removing the same."

It is an established principle in this State that growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Mizell v. Burnett,* 49 N. C., 249; *Moring v. Ward,* 50 N. C., 272; *Mizzell v. Ruffin,* 118 N. C., 69.

The true construction of this instrument now before the court is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed. *White v. Foster,* 102 Mass., 375, 378; *Moring v. Ward,* 50 N. C., 273; *Bunch v. Lumber Co.,* 134 N. C., 116. A con-

struction substantially similar has been placed on such deeds in the large timber growing States where contracts of this character are not infrequent. *Strasson v. Montgomery,* 32 Wis., 52; *Williams v. Flood,* 63 Mich., 487; *McCumber v. Railroad,* 108 Mich., 491.

In *Williams v. Flood, supra, Campbell, C. J.,* delivering the opinion, says: "It is not very important to discuss the exact nature of the plaintiff's rights under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for and all belonged to the plaintiff unless lost by forfeiture for nonremoval." In *McCumber's case, supra,* it is said that "the title to the timber remaining uncut at the expiration of the time limited, reverts to the owner." And *Walker, J.,* in *Bunch's case, supra,* says that "At the expiration of that time, the estate in so much of the timber as had not been cut and removed would revert to the vendor, or at least the timber would become his absolute property."

In the deed now before the court, the time fixed for the forfeiture is thus set forth: "All the timber now standing, or which may be standing on said lands during the period of fifteen years from and after the time when said parties of the second part, their heirs or assigns, shall begin to cut and remove said timber, and the time in which to begin to cut and remove said timber is not limited." A proper construction of the first part of this clause, as intimated in *Bunch's case, supra,* would fix the date of forfeiture at fifteen years from the time of commencing to cut, allowing a reasonable time to begin such cutting, and granting in any event the full term of fifteen years from the execution of the deed. By the last part of the clause, the time allowed for removal is indefinite and unlimited.

In the opinion of the court, this latter part of the stipulation as to the time should be rejected because it is indefinite and repugnant to the first, and, again, because it is contrary to the intent and purpose of the parties as indicated by the entire instrument.

In Devlin on Deeds, section 838c, it is said that "The whole object is to construe the deed so as to give effect to it if possible, as a conveyance, and clauses which are repugnant to the general intent of the deed must be declared void," citing to the same effect *Wilcoxon v. Sprague*, 51 Cal., 640. See also *Proctor v. Pool*, 15 N. C., 371.

In a subsequent clause of the deed, reference is again made to the time of forfeiture, as follows: "And the parties of the first part hereby grant and assure unto the said parties of the second part, their heirs, executors, administrators and assigns, the full term of fifteen years as above set forth, within which to cut and remove the timber hereby conveyed." And the entire language and purport of the deed indicate a purpose and intent of the parties that the time allowed for removal shall not be unlimited, but that the correct interpretation requires that the time is governed by the first and more definite stipulation of fifteen years, allowing a reasonable time to commence the cutting, and granting in any event the full term of fifteen years from the execution of the instrument. This deed of the plaintiff, conveying the timber, bears date February 25, 1893, and the parties have at least the full term of fifteen years within which to remove the timber bought by them, and which fills the description in the deed. Decisions on questions somewhat similar will be found in *Brown v. Carmichael*, 97 Ga., 487; *Baxter v. Mallux*, 106 Ga., 345.

The court is referred to *Mfg. Co. v. Hobbs*, 128 N. C., 16. There is no doubt about the decision in the *Hobbs case* being correct. The limit stated in that case was five years from the time the cutting should commence, and the grantees

had commenced thirteen years from the execution of the contract—eight years beyond the time stipulated. The right of the grantee there was five years, the time stipulated, allowing a reasonable time to begin.

Under the facts and circumstances of the *Hobbs case*, the court very properly held that the time of commencing was unreasonable, and, being eight years beyond the stipulated period, the rights of the parties under the contract had determined. But the opinion errs in holding that the deed was void. This conclusion was predicated on the assumption that the instrument in question was a lease and had no certain or definite beginning. As we have endeavored to show, this is not a lease, certainly not of the timber, but an absolute sale.

As stated by *Justice Walker* in *Bunch's case, supra:* "While some of the cases in this and other States liken a contract of the kind we are construing to a lease, it may be true that it should not be technically so construed, but that it should be regarded as a conveyance of the timber, or an interest or estate in the timber, upon condition that if it is not cut and removed within a given time, the interest or estate so conveyed shall revest in or revert to the grantor." There is also an intimation in *Moring v. Ward, supra,* that such an instrument is a lease. The point before the court in that case, however, was whether the contract was an estate or a license, and it was determined that the instrument conveyed a present estate. The character of the estate was not the question decided. Even if this were a lease, it would not be void.

In the *Bishop of Bath's case*, 6 Coke Rep., 36, Library Ed., volume 3, page 325, it is said: "A lease was made to A and B for sixty years, with a clause of re-entry immediately after the deaths of A and B, and of the longer liver of them within the term. After the death of A within the term, another lease of the same sort was made to C, *habendum et occupan-*

dum, when the former lease shall determine, after or by the death, surrender or forfeiture of the said deed." And it was there resolved that: "While every lease for years ought to have a certain beginning, but that is to be intended when it is to take effect in interest or possession, then the commencement ought to be certain; for a lease for years may be made on a condition or contingent precedent, as if I grant to you that if you pay me twenty pounds at Michaelmas next following, that you shall have my manor of D for one and twenty years; now it is uncertain whether it will commence or not, and in the meantime, till the payment of the money, it is not any lease, but it is sufficient that the commencement be certain when it is to take effect in interest or possession. So it is true that the continuance of it ought to be certain; but that is to be intended either when the term is made certain by express numbering of years, or by reference to a certainty, or by reducing it to a certainty by matter *ex post facto*, or by construction in law by express limitation."

In this case, a present estate passed at the execution of the grant, and when the entry was made to begin cutting, which is required to be in a reasonable time, the ending was fixed at the definite term of fifteen years. The court is of opinion that on the evidence offered, the injunction should have been dissolved, and there was error in continuing the same to the hearing.

It will be noted that the only question presented on the hearing was on the construction of the plaintiff's deed. There is an allegation in the pleadings that the deed was procured by fraud and misrepresentation. No testimony was offered, nor was the cause considered in that aspect. And this decision is without prejudice to the right of the plaintiff to renew his motion for injunction on presenting testimony making out probable ground of fraud.

Error.

LAVINIA HAWKINS v. LUMBER CO.

(Filed September 26, 1905).

D. L. Ward for the plaintiff.
A. D. Ward and *T. C. Wooten* for the defendant.

HOKE, J. The facts in this case are exactly similar to those presented in the appeal of *John L. Hawkins v. Goldsboro Lumber Co.*, and for the reasons given in the opinion in that case, the order continuing the injunction to the hearing will be set aside.

Error.

SHERROD v. INSURANCE ASSOCIATION.

(Filed September 26, 1905).

Insurance—By-Laws—Notices of Assessments Presumptions—Evidence.

1. A by-law of the defendant company which provided that any member failing to pay his assessment within sixty days from date of notice (which date shall be the day of mailing said notice), shall forfeit all rights in the company, is subject to rebuttal on the part of the plaintiff by showing nonreceipt of notice, the defendant having properly postpaid and addressed the same.

2. All contracts and by-laws of an incorporated society are made with reference to the general law, and they must conform to certain general requirements in respect to vested personal and property rights of members.

ACTION by J. T. Sherrod against Farmers' Mutual Fire Insurance Association, to recover loss on policy of fire insurance, heard on appeal from a justice's court by *Judge W. B. Councill* and a jury, at March Term, 1905, of the Superior

Court of MARTIN County. From a judgment in favor of the plaintiff, the defendant appealed.

T. T. Thorne for the plaintiff.
Harry W. Stubbs for the defendant.

BROWN, J. The only question presented is whether section 3, article 4, of the by-laws of the defendant company is subject to rebuttal on the part of the plaintiff by showing non-receipt of notice—the defendant having properly postpaid and addressed the same. The by-law is as follows: "Any member failing to pay his assessment within sixty days from date of notice (which date shall be the day of mailing said notice), shall forfeit all rights, claims and privileges in this association, and his policy shall by such failure be cancelled without any further notice."

The defendant introduced evidence tending to prove that it was its custom to notify members of assessments in case of loss, by written notice dropped in the postoffice, when an assessment had been called the witness stating that he sent out about 200 notices at the time the plaintiff is alleged to have failed to pay his assessments and that several of these notices came back through the dead letter office for misdirection in the address; that he could not say certainly that he ever mailed notice to the plaintiff, or that if mailed, it might have been one of those misdirected; that he was only swearing by his "system," and he believed he sent the notice because there was a check mark opposite the plaintiff's name on his books; that the plaintiff's name was still on his books, and the only thing to indicate that he was not in good standing in the defendant's company were the words "not paid" opposite his name. The plaintiff testified in his own behalf that he had never received any notice from the company of any assessment against him.

The court instructed the jury that proof of the mailing

of the notice "properly addressed and postpaid, raised a presumption that the notice was received by the plaintiff, but that is only a presumption of fact and could be rebutted, and that it was for the jury to find whether such notice was in fact properly addressed and mailed; if so then the presumption was that plaintiff received it, and unless he rebuts this presumption by showing that he did not receive the notice, the plaintiff could not recover." The defendant excepted to this instruction.

All contracts and by-laws of an incorporated society are made with reference to the general law, and they must conform to certain general requirements in respect to vested personal and property rights of members. 16 Am. & Eng. Enc., (1st Ed.), pages 41-42, and cases cited. Where an insurance company determines to cancel a risk, the insured is entitled to reasonable notice. *Ins. Co. v. Brooks,* 83 Md., 22. The instructions of the court to which the defendant excepts are correct and are fully sustained by the authorities. If the insurer sends the notice by mail properly addressed and stamped, the law presumes the addressee received it. The presumption may be rebutted, as appears to have been done in this case. *Rosenthal v. Walker,* 111 U. S., 185; Lawson on Presumptive Ev., 69; 19 Am. & Eng. Enc. (1st Ed.), pages 80-81, and cases cited.

Affirmed.

KING v. HOBBS.

(Filed October 3, 1905).

Reformation and Correction—Bond for Title—Mutual Mistake—Degree of Proof—Evidence.

1. To correct a bond for title on the ground of mistake, the evidence must be strong, clear and convincing, and where there is any evidence to go to a jury on the question, they are to determine under proper instructions whether the evidence is of the character required.

2. Where both the plaintiff and defendant testified that before they went to a justice of the peace to have a bond for title written, they had come to a definite contract of sale of the land, and that the timber previously sold and conveyed to a lumber company was excepted, a prayer for instruction "that there was no evidence to show that the clauses exempting from the bond the right and interest of the lumber company in the land were omitted from said bond by the mutual mistake of the parties," was properly denied.

ACTION by S. J. King against T. A. Hobbs, heard by *Judge O. H. Allen* and a jury, at the May Term, 1905, of the Superior Court of SAMPSON County.

The plaintiff alleged that in 1892 he sold and conveyed to a lumber company the short straw timber growing on a tract of land situated in Sampson County, and the company owned the same under a registered deed; and that in 1902 he sold this tract of land to the defendant for $300, and executed to the defendant a bond to make title on payment of the purchase money. This bond contained a stipulation that on payment of the purchase money, the plaintiff would make to the defendant a good, sure and indefeasible estate of inheritance, free from any and all incumbrances whatever. The plaintiff further alleged that in the sale of the land to the defendant, the short straw timber previously conveyed to the lumber company was excepted, and a stipulation to that effect

was omitted from the contract by the mutual mistake of the parties, and demanded judgment that the instrument be corrected and for the full amount of the purchase money. The defendant denied that there was any mistake, and resisted recovery on the ground that the short straw timber had been previously conveyed, and further claimed damages for breach of covenant by way of counterclaim, in case recovery was had against him on the purchase price. The single issue submitted was as to the alleged mistake in the bond for title. Verdict and judgment for plaintiff for full amount of purchase money. Defendant excepted and appealed.

F. R. Cooper for the plaintiff.
John D. Kerr for the defendant.

HOKE, J., after stating the case: At the close of the testimony, the defendant requested the judge to charge the jury "that there was no evidence to show that the clauses exempting from the bond for title the right and interest of the lumber company in the land in controversy were omitted from said bond by the mutual mistake of the parties." The prayer for instruction was refused, and the defendant excepted. This exception raises the only point presented for our consideration.

To correct an instrument of this character on the ground of mistake, the evidence must be strong, clear and convincing, and our decisions have established the principle that where there is any evidence to go to a jury on the question, they are to determine under proper instructions whether the evidence is of the character required. *Lehew v. Hewett*, 138 N. C., 6. Under the charge of His Honor, the jury have found the issues as to the mistake against the defendant, and the court is of the opinion not only that there was evidence sufficient to be submitted to the jury, but that it fully justifies the verdict which they rendered.

Both the plaintiff and the defendant testify that before they went to the justice of the peace to have the instrument written, they had come to a definite contract of sale of the land, and that the timber previously sold and conveyed to the lumber company was excepted. King, the plaintiff, testified that he was to give the bond for just what he had; that Hobbs knew all about the sale of the short straw timber to the company, and talked about how it was to be measured; that he sold Hobbs the land and the long straw timber, and Hobbs was to take the witness's place with the lumber company.

Hobbs, the defendant, testified that "at the gin (the place where the trade was made), the plaintiff did tell me he had sold the short straw timber. I thought I was buying the land with the timber left out. When the bond was signed, I thought I was buying all timber except 12 inches and upward. He told me he had sold that. I did not understand I was buying that. I knew there was a deed." The defendaant also testified "that the clause in question was not left out by mistake, and that nothing was said about excepting anything."

A witness by the name of Bradshaw testified: "Hobbs, the defendant, told me he had bought the land, and all he disliked about it was that the timber on it was sold."

The plaintiff and the defendant then went to a justice of the peace to have their contract put in writing, and the justice evidently by inadvertence or mistake (whether of himself or the parties makes no difference), omitted a material stipulation. In such case all the authorities are agreed that the instrument will be reformed so as to express the true intent and meaning of the parties.

This is not an instance of an essential mistake or misunderstanding in the agreement itself, nor where the written instrument is supposed to embody the first and only contract of the parties, but is a case of an error of expression where

the parties have come to a definite agreement beforehand, and, in the endeavor to put this agreement in writing, a mistake is made, so that the instrument as drawn does not, in some material point, express the contract it was intended to evidence. In 20 Am. & Eng. Enc. (2nd Ed.), page 823, it is said: "That in mistakes of this kind the only inquiry is, does the instrument contain what the parties intended that it should, and understood that it did? Is it their agreement? And it is wholly immaterial whether the defect is a statutory or common law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect." The authorities are numerous and fully bear out this statement of the doctrine. *Stamper v. Hawkins,* 41 N. C., 7; *Warehouse Co. v. Ozment,* 132 N. C., 839; *Rogers v. Atkinson,* 1 Ga., 12; *Stines v. Hayes,* 36 N. J. Eq., 364; *Leitensdorfer v. Delphy,* 15 Mo., 137. In this last case, it is held that "equity will correct a mistake, either as to fact or law, made by a draftsman of a conveyance or other instrument which does not fulfill, or which violates the manifest intention of the parties to the agreement." In *Stines v. Hayes, supra,* it is said: "Nor will the fact that the defendant denies that there is a mistake and testifies that the deed was drawn according to the intention of the parties, prevent the court from granting the relief if it is satisfied that the deed is not in accordance with the agreement, but ought to be so." And it has been held that the courts will correct an error of this kind when the complainant himself drew the paper. *Cassady v. Metcalf,* 66 Mo., 519.

This last case, in the principal facts, is very similar to the one before us, and it is there held that "a court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied that by mistake, in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract, and this in a case where the complainant

himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of the words or through sheer carelessness."

There was no error in refusing the defendant's prayer for instruction, and the judgment of the court below is

Affirmed.

LUMBER CO. v POLLOCK.

(Filed October 3, 1905).

Banks and Banking—Collaterals. Expenses of Collecting—Trustees.

1. Where a bank lends money upon collaterals and comes into court to defend their validity, it is entitled to retain its necessary and reasonable disbursements out of the sum realized upon such collaterals.

2. The bank occupied the relation of trustee, and as such it held the collaterals, and it was its duty to protect them. Questions of public policy, such as usury or encouraging litigation, are not involved.

ACTION by Hickson Lumber Company and others against Gay Lumber Company and others, heard by *Judge Fred Moore*, at the November Term, 1904, of the Superior Court of LENOIR County.

This is an appeal from an order allowing certain sums claimed by the Norfolk National Bank, and directing the receivers to allow the same. The defendants, assignees of S. H. Loftin, appealed.

Busbee & Busbee for the plaintiff.

Y. T. Ormond for the defendant.

BROWN, J. The Norfolk National Bank loaned S. H. Loftin a large sum of money, and took as collateral security certain notes and mortgages made by the Gay Lumber Company. Loftin, failing to pay his debt, and the Lumber Company failing to pay its notes, the bank employed counsel and proceeded to collect the collaterals. Is the bank entitled to be reimbursed the reasonable and proper costs and expenses incurred in collecting the collaterals? We are of opinion that it is, and we affirm the judgment and order of His Honor below.

The cases of *Turner v. Boger,* 126 N. C., 300, and others cited by the appellant have no application here. Those cases were controversies between creditor and debtor direct, and we affirm the principles settled in them.

Here, the question is presented before this court for the first time, as to whether or not a bank lending money upon collaterals and coming into court to defend their validity, is entitled to retain its necessary and reasonable disbursements out of the sum realized upon such collaterals. Questions of public policy, such as usury or encouraging litigation, are not involved. The bank occupied the relation of trustee, and as such it held the collaterals. It was its duty to protect them. Under the terms of the written instrument assigning the collaterals to the bank, the authority is given to collect them and apply the net proceeds to the debt due it by Loftin. No question is raised as to the reasonableness of the sum expended. Undoubtedly an unreasonable sum would not be allowed by the courts.

When a creditor takes a note of a third person as collateral security for his debt, he is bound to use due diligence in the collection of the collateral. He is responsible to his debtor for any loss occasioned by his *laches.* The creditor is entitled to receive all reasonable cost and expenses incurred in the protection and collection of the collateral to the same extent as any other trustee. These principles are supported

by most abundant authority, and are founded in reason and justice. Jones on Pledges, sections 400 and 680; *Griggs v. Howe*, 42 N. Y., 166, 173; *Starrett v. Barber*, 20 Mo., 457; *Gregory v. Pike*, 67 Fed. Rep., 837; Colebrook on Coll., sections 90, 111, 114; *Hurst v. Coley*, 22 Fed. Rep., 183, and many other cases.

It would be inequitable to require the bank to protect and collect Loftin's property at its own expense, because Loftin owed it a debt which he had failed to pay.

Affirmed.

HOKE, J., did not sit on the hearing of this appeal.

HAWKS v. HALL.

(Filed October 3, 1905).

Return to Notice of Appeal—Justices of the Peace.

1. The failure of a justice of the peace to sign the return to notice of appeal does not vitiate the proceedings in the Superior Court, where the appellant had given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the Superior Court at the trial in person and by attorney.

2. If the justice fails to discharge his duty to make his "return of appeal," he may be compelled to do so by attachment, and if the return be defective, the judge may direct a further or amended return.

ACTION by A. K. Hawks against A. M. Hall, heard on appeal from a justice of the peace by *Judge O. H. Allen* and a jury, at the May Term, 1905, of the Superior Court of SAMPSON County.

This action was begun in a justice's court, and was to recover the sum of $34.75, with interest thereon from the 12th

day of September, 1903. Summons was issued on May 16, 1904, and case was tried before *R. H. Hubbard, J. P.*, on May 24, 1904. The justice rendered judgment for the defendant against the plaintiff for cost. Plaintiff gave verbal notice of appeal in open court when judgment was rendered, and paid the justice the appeal fee. The justice sent up to the court all the papers in the case, with a paper, entitled A. K. Hawks v. A. M. Hall, purporting to be a return to notice of appeal. This paper is dated May 24, 1904, and is not signed by any one. It recites that it was issued pursuant to annexed notice of appeal, but no notice is annexed and none was sent up in the papers. The notice being given in open court, as above stated, upon this unsigned return, the case was docketed in the Superior Court on July 18, 1904. No written pleadings were filed in the justice's court, and there was no pleading in the Superior Court, except as contained in the unsigned "return to notice of appeal," and the original summons. The next court after the appeal was docketed was in October, 1904. There was also a court in February, 1905, prior to the trial term, May, 1905, and the defendant never made any motion to dismiss for failure to docket in time, and never made any motion in the cause for any purpose; but made a general appearance in the Superior Court at the trial in person and by attorney.

After the rendition of the judgment, from which the defendant appealed, and after court had adjourned for the term, it was found that the paper purporting to be a "return to notice of appeal" was not signed by any one.

Geo. E. Butler for the plaintiff.
F. R. Cooper for the defendant.

CONNOR, J., after stating the facts: This record presents the somewhat remarkable feature of an appeal from a judgment to which there is no exception and no suggestion of any

error committed at any stage of the trial. The point upon which we are asked to reverse the judgment was not made below, and the fact upon which the motion is based was not known to counsel until after the judgment was rendered and the court adjourned. To meet this condition the defendant's very ingenious counsel insists that the failure of the justice to sign the return on appeal deprives the Superior Court of any jurisdiction to hear or determine the case; that the proceedings had in that court are absolutely void. We cannot concur with this view. It is not to be questioned that the Superior Court has no other than appellate jurisdiction. The appeal perfected by notice and the payment of the justice's fee, takes the case into the Superior Court without any further action on the part of the appellant. If the justice fails to discharge his duty to make his "return of the appeal" he may be compelled to do so by attachment, and if the return be defective, the judge may direct a further or amended return. Code, sections 878, 879. It will be observed that the return to be made is "*of the appeal*," clearly showing that it constitutes no essential element *in the appeal*, but simply a statement of what was done in the inferior court. It would be trifling with the administration of justice to permit an appellant who had done everything required of him to take and perfect an appeal, to be deprived of his right after a trial in the appellate court because of an inadvertent failure of the justice to sign his name to "the return of the appeal." If the attention of the court had been called to the omission, it would have summoned the justice and permitted him to sign the return at any time during the trial or even after judgment. If either party was not content with the return as made, the court, upon motion, would have directed a "further or amended return," as provided by section 879. There is no merit in the defendant's contention, and the judgment must be

Affirmed.

PORTER v. ARMSTRONG.

(Filed October 3, 1905).

Drainage Laws—Constitutional Law—Report of Commissioners—Findings by Court.

1. The contention that our drainage laws (chapter 30 of The Code, and amendments thereto,) are unconstitutional, in that the land is to be taken for a mere private purpose, is without merit.

2. Where the judge set aside the report of commissioners because the report did not comply with the statute, and further found as a fact in his order that two of the commissioners had been guilty of gross indiscretion, this court would not reverse his order, whether the report conformed to the statute or not.

3. The Code, chapter 30, and the amendments thereto, are the charts which should guide the commissioners, and that portion of the judge's order, wherein he undertakes to instruct the new commissioners as to their duties, should be set aside.

ACTION by Elisha Porter against T. J. Armstrong and others, heard before *Judge O. H. Allen,* at the February Term, 1905, of the Superior Court of PENDER County.

This is an appeal by the plaintiff from an order setting aside the report of commissioners appointed pursuant to the act for draining and daming lowlands, chapter 30 of The Code and amendments thereto.

Stevens, Beasley & Weeks and *Shepherd & Shepherd* for the plaintiff.

E. K. Bryan and *J. T. Bland* for the defendants.

BROWN, J. It is contended by the defendants that these proceedings should be quashed, as the acts under which they are instituted are violative of the Federal Constitution, as well as our own, inasmuch as the land of the defendants is to be taken for a mere private purpose. The constitutionality

of our drainage laws has been settled as far as repeated decisions of this court can settle it. *Norfleet v. Cromwell,* 70 N. C., 638; *Brown v. Keener,* 74 N. C., 714; *Pool v. Trexler,* 76 N. C., 297.

The judge below set aside the report "being of the opinion that the report of the commissioners, filed herein, does not comply with the statute in such case made and provided."

His Honor further finds as a fact in his order that two of the commissioners "have been guilty of gross indiscretion while hearing this cause," and ordered that they be relieved from any further duties. This latter finding is sufficient to justify setting aside the order in His Honor's discretion. Although such is not the reason given for setting aside the report, yet in the face of such a finding by a judge of the Superior Court, we would not feel justified in reversing his order, whether the report conformed to the statute or not. It is best in the interests of justice that the clerk proceed to carry the order into effect by appointing other commissioners.

That portion of His Honor's order, wherein he undertakes to instruct the new commissioners as to their duties, should be set aside. Those instructions may or may not be correct. If incorrect, and they should be followed by the commissioners to be appointed, their report would have to be set aside.

The Code, chapter 30, and the amendments thereto are the charts which should guide the commissioners, and their decisions, findings and report should conform thereto. Upon the coming in of their report, its correctness may be reviewed.

Let the cause be remanded to the Superior Court of Pender County to be proceeded with in accordance with this opinion. Let the costs of appeal be taxed equally against the plaintiff and the defendants.

Modified and affirmed.

WALKER, J., concurs in result.

DARDEN v. TIMBERLAKE.

(Filed October 3, 1905).

Deeds, Construction of—Heirs of Living Person—Husband and Wife—Tenants in Common—Tenants by Entirety—Survivorship.

1. Under a deed to "S and wife A, and their heirs, including the former children of said A by another husband," the plaintiffs, who are A's children by the former husband, and were living at the time of the execution of the deed, took as grantees and as tenants in common with S and A.

2. The words "and their heirs," in said deed are to be rejected as surplusage, a conveyance to the heirs of a living person being void.

3. Where a conveyance is made to the husband and wife and three children, the husband and wife are together seized of one-fourth by entireties, and the children of one-fourth each, and upon the death of the wife, the husband acquires the one-fourth by right of survivorship. (Dictum in *Hampton v. Wheeler*, 99 N. C., 222, corrected).

ACTION by Charles Darden and others against Nelson Timberlake and others, heard by *Judge W. R. Allen* upon the pleadings and admissions at the May Term, 1905, of the Superior Court of WILSON County. From the judgment rendered, both parties appealed.

PLAINTIFFS' APPEAL.

Connor & Connor for the plaintiffs.
F. A. Woodard and *Pou & Finch* for the defendants.

BROWN, J. Plaintiffs and defendants claim under a deed by "R. J. Taylor and wife, of the first part, and Samuel Williams and wife Annie, and their heirs, including the former

children of the said Annie by another husband, of the second part." Annie died, leaving Sam surviving. They had no children of their marriage. Plaintiffs are Annie's children by the former husband. Defendants are Sam's heirs at law. His Honor held that Sam, Annie and the three plaintiffs took as tenants in common, and that each took one-fifth and that Sam acquired Annie's fifth by survivorship, and that upon Sam's death his undivided two-fifths descended to the defendants.

1. The plaintiffs took as grantees under the deed. They were living at the time of its execution, and were the children of a named person. The designation is sufficiently certain to enable them to take as grantees. In *Helms v. Austin* the grantees were "Sarah Staton, his wife, and her heirs, named on the back of this deed, of the other part." On the back was endorsed the names of the children. In another deed referred to in the same case, the grantees are "Sarah Staton and her children." 116 N. C., 751. The deeds were held to be valid conveyances and created a tenancy in common between the grantees, including the children. See also *King v. Stokes*, 125 N. C., 514; *Hampton v. Wheeler*, 99 N. C., 222; 9 Am. & Eng. Enc., (2nd Ed.), page 132, note 9.

The words "and their heirs" contained in the deed under consideration, are to be rejected as surplusage. A conveyance to the heirs of a living person is void, for *nemo est haeres viventis*. Broom's Legal Maxims, 522. A deed purports to convey *in presenti*, and the grantees cannot be ascertained until the death of the person named. 9 Am. & Eng. Enc., (2nd Ed.), page 132, note 9. But it is otherwise where the word children is used. Eliminating the words, "and their heirs," Sam, Annie and the latter's children (these plaintiffs), by a former husband, are the grantees in this deed. In our opinion, His Honor was correct in holding that those grantees took as tenants in common.

2. His Honor held that Sam and Annie took one-fifth each. In this there was error. Sam and Annie took by entireties and not in severalty. They were neither joint tenants nor tenants in common with each other. They were considered one person in law, and could not take by moieties. They were both seized of an entirety. Upon this proposition the learned counsel for plaintiff, in an unusually helpful and well prepared brief, cites us to *Lord Coke,* who says: "Also, if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety, (and the third person shall have as much as the husband and wife, viz., the other moiety, etc.). And the cause is, for that the husband and wife are but one person in law * * * In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife hath but the third part, and the other men the other two parts." Coke on Littleton, section 187b; Freeman on Cotenancy, page 129. See also 2 Kent's Com., star page 132; 2 Blk. Com., chapter 12, and notes to Cooley's Edition; *Bruce v. Nicholson,* 109 N. C., 202; *Johnson v. Edwards, ibid,* 466. It is useless to multiply authorities. It is elementary learning that husband and wife are seized by entireties, *per tout et non per my,* and upon such seizin the right of survivorship depends.

In this connection we are not inadvertent to the dictum of *Mr. Justice Merrimon* in *Hampton v. Wheeler, supra.* The contest in that case was not as to whether Alfred Hampton and his wife took by entireties with the incident of survivorship, but as to whether the husband and wife and their children were tenants in common. Hampton and wife had conveyed the land in fee. Their children were claiming as tenants in common with the grantees of their parents, and the real question decided was as to the effect of the statute of limitations. There being seven children, the learned justice

was evidently in error in dividing the land into nine parts. Under all the authorities, Hampton and wife took one-eighth in entirety, instead of two-ninths. It was an evident inadvertence upon the part of that able and usually accurate judge. It is a case of "Homer nodding," which sometimes happens to the best of judges.

It follows therefore that Sam and Annie were together seized of one-fourth, and the three plaintiffs of one-fourth each. Sam acquired the one-fourth by right of survivorship, which at his death descended to the defendant. The cause is remanded to the Superior Court of Wilson County with instructions to enter a decree in accordance with this opinion.

Error.

DEFENDANTS' APPEAL.

BROWN, J. The defendants claim the whole of the land, contending that the plaintiffs took nothing under the deed, but that Sam and Annie Williams took the whole of the land in fee, and that Sam acquired the whole by survivorship. No authority is cited in the defendant appellants' brief to sustain this contention, presented upon their appeal, and we have been unable to find any. The question presented by this appeal is decided adversely to the defendants by our opinion in the plaintiffs' appeal. The cause is remanded to be proceeded with in accordance with that opinion.

In holding that Sam and Annie Williams did not take the whole of the land under the deed from Taylor and wife, His Honor committed no error. The defendants having lost both appeals are taxed with the costs of both.

No Error.

KIRKMAN v. HOLLAND.

(Filed October 3, 1905).

Trusts—Adverse Possession—Statute of Limitations—Evidence—Statute of Uses—Deeds.

1. Where property was conveyed in trust for M during her life, with power of appointment, and on her failure to make the appointment in trust to surrender and deliver up said property to such child, etc., as may be living at her death, and M died in 1903, *held*, that possession by the defendant of said property since 1856, claiming to own the same in fee simple, under a deed from W, who had no title, is adverse to the trustee and bars the plaintiffs, who are the child and grandchild of M.

2. Evidence that the trustee had knowledge of a contract entered into between M, under which the property was turned over to the father of W, who was soon in possession of said property, was incompetent.

3. Evidence that the trustee from 1855 and up to the death of M made no effort to recover possession of the property because he was told by M not to do so, that she had sold her life estate, but that her daughters would be entitled to the property after her death, was properly excluded.

4. A trust, declared in a deed to a trustee which imposed the duty upon the trustee to convey the legal title when directed by M, and in default of such instruction to surrender and deliver it up to such child, etc., as M might leave surviving, is not of that class which is executed by the statute of uses.

5. When the trustee, in an active trust, is barred by the statute of limitations, the *cestui que trusient* are also barred.

6. Where one has a deed conveying no title, interest or estate, and enters under said deed, claiming to own the land in fee simple, such possession is adverse to the owner.

ACTION by Emeline Kirkman and another against J. B. Holland and others, heard by *Judge W. R. Allen* upon an agreed statement of facts at the February Term, 1905, of the

Superior Court of CRAVEN County. From a judgment for the defendants, the plaintiffs appealed.

This is an action for the recovery of two lots in the city of New Bern. Plaintiffs claimed under the following chain of title: Deed from Joseph Merkell to Jno. Peter Merkell, bearing date April 15, 1841, upon the following uses and trust, to-wit: "In trust for the sole and separate use of Caroline M. Merkell, wife of the said Joseph Merkell, during the life of the said Caroline Merkell, so that said real estate hereby granted shall not be liable, or in any manner subject to, the debts, contracts or engagements of the said Joseph Merkell, and further to grant and convey said property or any part thereof to such person or persons for such considerations and for such interests and estates as the said Caroline M. Merkell, shall, by any writing under hand and seal during her coverture, direct, limit or appoint, and upon the dissolution of the said marriage by the death of the said Caroline M. Merkell, and on her failure to make the appointment above mentioned in trust to surrender and deliver up said property to such child or children of the said Joseph Merkell, and Caroline M. Merkell, his wife, as may be living at her decease."

By successive conveyances, the title to the said property was vested in R. A. Russell on the 4th day of August, 1855, upon the same trusts set forth in the deed of April 15, 1841. Caroline M. Merkell died on the 27th day of December, 1903. The plaintiff, Emeline Kirkman, is a daughter, and plaintiff, Ella Moore, is a granddaughter of the said Caroline M. Merkell. The defendants claim title to the real estate in controversy under deed executed by T. G. Wall and wife, Janet, to Samuel Bishop during the year 1856. The said Janet Wall was a daughter of William Hollister. This deed recites that this lot had been contracted to be sold to Wm. Hollister. By mesne conveyances such title as Bishop acquired by said deed passed to and vested in the defendants. The defendants, and those under whom they claim, by the

said chain of title have been in possession of the said property under said deeds claiming to own the same in fee simple since the day of 1856. That plaintiffs and the trustees had no other notice of this claim than that which the law implies from actual possession and the registration of the deeds. The plaintiffs offered to show by R. A. Russell, the trustee and brother of Caroline Merkell, that he had knowledge of a contract entered into between Caroline Merkell and Joseph Merkell, under which the lot was turned over to William Hollister, a near relative of Janet Wall, who was soon in possession of said property. To this testimony the defendant objected. Objection sustained and plaintiffs excepted. Plaintiffs also offered to show by said witness that from 1855 and up to the death of Caroline Merkell, his sister, he made no effort to recover the possesion of the said property because he was told by his said sister not to do so, that she had sold her life estate, but that her daughters would be entitled to the said property after her death. Defendants objected—objection sustained and plaintiffs excepted. The defendants relied upon the statute of limitations to bar the action of the plaintiffs. Judgment was rendered for the defendants and plaintiffs appealed.

W. D. McIver for the plaintiffs.
W. W. Clark for the defendants.

CONNOR, J., after stating the facts: The first question to be disposed of is the admissibility of the proposed testimony. In respect to the first question, we concur with His Honor. Assuming the fact to be proven, which we must do for the purpose of passing upon the exception, we do not see how it could affect the right of the defendants; they do not claim under William Hollister, nor does it appear that he was to become the purchaser. The mere fact that Joseph Merkell and his wife made a contract, under which the lot was turned

over to him prior to the execution of the deed from his daughter, Mrs. Wall, to Bishop, did not tend to show that either Mrs. Wall or her grantees were in possession under Mrs. Merkell. The contract may, so far as it appears, have been a lease to Mr. Hollister. The fact that he was "soon in possession" does not intend to show that he was a purchaser and if it did, there is no legal connection between that fact and the execution of the deed by his daughter to Bishop. If the fact were admitted, the deed from Wall and wife would have conveyed no estate either legal or equitable to Bishop. In respect to the second question we also concur with His Honor. We do not perceive how Mrs. Merkell's declaration, that she had sold her life estate, can be competent against the defendants. If competent, the proposed testimony is too indefinite to base any conclusion upon. It does not appear to whom she said that she had sold, or when the declaration was made. If made after the entry by Bishop, under his deed, it would be clearly incompetent. With the proposed testimony excluded, the case as decided by His Honor presents the single question whether the possession by Bishop and those claiming under him was adverse to the trustee, thereby barring the *cestui que trustent*. It is clear that the trust declared in the deed to John Peter Merkell, which passed to Russell, was not one of that class which was executed by the statute of uses. The duties imposed upon the trustee to convey the legal title when directed by Mrs. Merkell and in default of such direction to "surrender and deliver it up to such child, etc., as she might leave surviving" prevented the operation of the statute. *Perkins v. Brinkley,* 133 N. C., 154. The legal title remained in the trustee until the death of Mrs. Merkell. This being so, it would seem that the case comes directly within and must be governed by the decision of this court in *King v. Rhew*, 108 N. C., 696. There is but one possible difference between the two cases. In that case it was admitted that the defendant had been in the actual,

open possession of the land claiming adversely under said deed and such possession was adverse, unless in law it was not so. In our case it is admitted that the defendants and those under whom they claim have been in possession under such deeds, claiming to own said property in fee simple since 1856. We are unable to see any substantial difference between the two cases. When one has a deed conveying no title, interest or estate and enters under said deed, claiming to own the land in fee simple, it is difficult to see why such possession is not adverse to the owner. The learned counsel for the plaintiffs call our attention to section 146 of The Code. It is not necessary to consider the effect of this section because, conceding the presumption raised thereby, it is rebutted by the admission in the case agreed. The counsel suggest that the decision in *King v. Rhew, supra,* is based upon subtle refinement rather than upon plain reason. However this may be, the opinion of *Mr. Justice Shepherd* shows clearly that in this State, at least, the authorities are uniform. The discussion in that opinion leaves nothing to be said by us upon the subject. It would seem that, accepting as we must do the doctrine as announced in that case, the facts in this record bring the case clearly within it. There the defendant grantors entered under a deed attempted to be made by the owner of the equitable life estate. There was in fact no ouster of the life tenant. She and her husband undertook to sell the lot and put the purchaser in possession—yet the court held that because the deed was void by reason of a defect in its form and execution, the entry of the grantee was an ouster of the trustee and the possession adverse. In our case, if the proposed testimony were competent it would not show any deed or paper title to Mrs. Wall. If Russell had owned the land free from any trust there would be no question that upon the admitted facts he would be barred. This being so, the *cestui que trustent* are also barred. It is a hardship on the plaintiffs and if it were an open question, we

should attach much weight to the able argument and brief of their counsel, but we cannot unsettle rights acquired under decisions which have become rules of property. The judgment must be

Affirmed.

OUTLAW v. GARNER.

(Filed October 3, 1905).

Wills—Legacies—Evidence Presumption of Payment of Legacies—Burden of Proof.

1. Defendant's intestate in January, 1861, was bequeathed, among other legacies, $500.00 in money to her and her heirs forever, and if she died leaving no child, said money to go to plaintiff's intestate and her heirs. Defendant's intestate died in 1903, leaving no child, and plaintiff's intestate died in 1887. In this action, brought to recover the $500.00, alleging that the legacy had been paid to defendant's intestate, the following evidence: 1. The will. 2. The inventory and account sale filed in 1861, showing $13,000. 3. Report of commissioner showing that in September, 1863, that there was in the hands of executors $14,000 due the legatees, none of whom had then been paid. 4. Receipts from two of the legatees in 1868, acknowledging receipt of a much smaller amount than their legacies, in full of all due from said executor, was properly held no evidence of payment of said $500 legacy to defendant's intestate.

2. The presumption of payment from the lapse of time arises only between the executor and legatee, between debtor and creditor, it being a protection to discharge a liability and it cannot arise to create a liability to a third person on the part of the person who should have received the legacy.

3. To create any liability on the part of the legatee over to the remainderman, there must be proof that the legatee recovered the sum.

ACTION by J. B. Outlaw, Administrator of Axy Simmons, deceased, against Joel J. Garner, Administrator of Rachel

Garris, deceased, heard by *Judge W. R. Allen* and a jury, at the August Term, 1905, of the Superior Court of DUPLIN County. From a judgment for the defendant, the plaintiff appealed.

Grady & Graham for the plaintiff.
H. B. Parker, Jr., and *Thad. Jones* for the defendant.

CLARK, C. J. Nathan Garner, who died in January, 1861, bequeathed, among other legacies, to his daughter Rachel, a negro girl, and "$500 in money to her and her heirs forever. If the said Rachel Garner should die leaving no child or children, my will and desire is further that Axy Simmons to have said negro and the $500 to her heirs forever." Rachel died a widow and intestate in November, 1903, leaving no child. Axy Simmons died intestate in February, 1887, and the plaintiff qualified as her administrator January 13, 1904. This action was brought to recover the $500, alleging that the legacy had been paid to Rachel Garner. This is denied by the answer. The plaintiff, to sustain the burden of this allegation, relies upon the following evidence: 1. The will which bequeathed $3,300 in pecuniary legacies and made specific devises of certain realty and required the residue to be sold and proceeds divided between his four sons. 2. The inventory and account sales, filed by the executors, January and February, 1861, showing nearly $13,000 total. 3. Report of commissioner showing that on September 9, 1863, there was in the hands of said executors nearly $14,000 (including interest) due the legatees, none of whom had then been paid. 4. Receipts from two legatees (out of the ten) in April and October, 1868, acknowledging receipt of a much smaller amount than their respective legacies, "in full of all due from said executor."

The court properly held that there was no evidence of payment of said $500 legacy to Rachel to charge her estate in

favor of the plaintiff. Had there been any presumption of payment, it would have arisen at the end of two years, when by the statute (Rev. Code, chap. 46, sec. 24,) the executor was required to pay over, and this was rebutted by the plaintiff's evidence that the legacies were still unpaid in September, 1863, and the only evidence of subsequent payment was that of much smaller sums than their legacies "in full payment" to two other legatees in 1868. This was surely no evidence of a payment in full, or any payment at all, to Rachel. The inference, if any, indeed would be to the contrary.

But aside from that, the presumption of payment from the lapse of time arises only between the executor and legatee, between debtor and creditor. It is a protection to discharge a liability. It cannot arise to create a liability to a third person on the part of the person who should have received the legacy. To create any liability on the part of the legatee over to the remainderman, there must be proof that the legatee received the sum. When A owes B the lapse of time may raise a presumption of payment for the protection of A who may have lost his receipt, or have satisfied B otherwise than by payment, but it never creates a liability on B's part to a third person by reason of such presumed payment. Like the statute of limitations, presumption of payment "is a shield, never a sword." This is clearly stated by *Mr. Justice Burwell*, in *Cox v. Brower*, 111 N. C., 422, that the presumption of payment of a legacy is in favor of the party to be charged (not against him) "for the sake of repose and to discourage stale claims." The presumption against official misconduct also is a presumption in favor of the officer and cannot be invoked for the purpose of putting another officer in default. 22 Am. & Eng. Enc. (2nd Ed.), 1270; *Weimer v. Bunbury*, 30 Mich., 201; *Houghton v. Rees*, 34 Mich., 481.

The fact that a debtor could and ought to have paid is not proof or presumption in favor of one seeking to charge the

creditor. The party relying upon such payment, as a cause of action, must prove it. In nonsuiting the plaintiff there was

No Error.

STONE v. STEAMSHIP CO.

(Filed October 3, 1905).

Carriers—Warehouseman or Wharfinger—Freight—Negligence—Custom—Evidence.

1. Where goods were placed upon the defendant's wharf and the plaintiffs, consignees, were notified of their arrival and paid the freight and commenced to remove them, the defendant's responsibility as a common carrier thereby terminated, and any obligation which remained was that of warehouseman or wharfinger, and the standard of conduct is that of ordinary care.

2. Where goods arrived at destination on Tuesday and were placed upon defendant's wharf (which is not enclosed, but is covered by a tin shed), according to local usage, and plaintiffs were immediately notified of their arrival, were given time to remove them, and paid the freight and removed a part of the same to their place of business on Wednesday, and on that night said goods were damaged by a wind and snow storm, *held*, that these facts do not amount to actionable negligence.

3. While neither usage or custom, as a general rule, will sanction or excuse an act which the law condemns as negligent, it is pertinent evidence on the question whether there has been negligence in a given case.

ACTION by R. R. Stone and others against Clyde Steamship Company, heard by *Judge O. H. Allen* upon appeal from a justice of the peace, at the April Term, 1905, of the Superior Court of NEW HANOVER County, on the following case agreed:

1. The plaintiffs are a partnership doing business in Wilmington, and the defendant is a corporation operating a line

of steamships for the purpose of carrying freight and passengers between New York and Wilmington and other points.

2. At the termination of its line in Wilmington the defendant owns and controls a wharf or platform upon which goods are unloaded from its vessels; the said platform is not enclosed, but is covered by a tin shed or roof under which said goods are piled on being unloaded; the said platform is open at all times and on a level with the ground, and upon it consignees of freight are accustomed to go and do go with drays and other vehicles, for the removal of freight; the defendant makes no charge to shippers or consignees of freight for the use of said platform or wharf except as follows: The vessel from New York arrives on Tuesday of each week on its regular schedule and is unloaded on Tuesday and if consignees allow goods to remain on platform longer than the next Monday a charge is made for the same, but no such charge was made in this case. It is the custom of the customers of the defendant in Wilmington to remove the same from said wharf at their earliest convenience, the defendant having no other means of storing the same, and this is known by the shippers and receivers of freight.

3. On January 24, 1904, the Hargrave Biscuit Co. of Baltimore shipped to the plaintiffs, at Wilmington N. C., over the defendant's line, certain boxes of crackers to be delivered to the said plaintiffs at Wilmington N. C., and the said defendant received the same for transportation and issued its bill of lading therefor.

4. The said goods arrived in Wilmington on defendant's vessel on the morning of Tuesday, February 9, 1904, and were delivered from said vessel upon the said wharf or platform in said city on the same day, and defendant immediately notified plaintiffs of such arrival; on Wednesday, February 10, 1904, the plaintiffs paid the freight due upon said goods and removed a part of the same from said platform or wharf to their own place of business; on the night of the 10th,

after said freight had been paid, a wind and snow storm occurred in Wilmington and blew snow and rain under the said shed and upon the said goods, by reason of which the said goods were damaged to the amount of $29.55 before the plaintiffs had completed the moving of the same to their own place of business.

It is agreed that this case may be submitted to the court on the foregoing statement of facts and that the court may render a judgment thereon as it may find the law to be.

From a judgment for the defendant, the plaintiffs appealed.

Louis Goodman for the plaintiffs.
Rountree & Carr for the defendant.

HOKE, J. On the foregoing facts and according to our decisions defendant's responsibility as common carrier had terminated (*Hilliard v. Railroad,* 51 N. C., 343,) and any obligation which remained was that of warehouseman or wharfinger. The standard of conduct in such case is that of ordinary care, and applying such standard to the facts before us, we are of opinion that there has been no negligence on the part of the defendant which amounts to an actionable wrong. The goods were placed on the defendant's wharf according to local usage, known to defendant's customers, and presumably acquiesced in by the plaintiff, as he paid the freight and commenced the removal of the goods without any protest as to their placing. While it is true that neither usage nor custom, as a general rule, will sanction or excuse an act which the law condemns as negligent, it is pertinent evidence on the question whether there has been negligence in a given case. *Morehead v. Brown,* 51 N. C., 367.

Furthermore, the plaintiff had been promptly notified of the arrival of the goods, and, so far as appears, had been given ample time and opportunity to remove them. On the

facts disclosed in the case agreed, the authorities are against the plaintiff's right to recover. *Chalk v. Railroad,* 85 N. C., 423; *Holdsclaw v. Duff,* 27 Mo., 392.

No Error.

PEACOCK v. BARNES.

(Filed October 3, 1905).

Judicial Sales—Shortage in Acres—Correction of Mistake—Warranty.

1. Where a complaint alleges that the plaintiff, at a sale by a commissioner to make assets, purchased at a certain price per acre, a tract of land, the commissioner representing that said land contained 416 acres, and bids being asked for at so much per acre, and paid for 416 acres, and subsequently ascertained that the tract contained only 320 acres, *held,* that a cause of action is set up, in seeking to correct an overpayment by reason of an error in calculating the amount due, when there is no *laches* shown as to the purchaser and no change of condition by reason of which correction would work a prejudice to those for whose interest the land was sold.

2. There is no implied warranty in the sale of real estate when made otherwise than by judicial decree, either as to quantity, title, or encumbrance, and the cases in which the courts have relieved the purchaser at a judicial sale by reason of a defect of title or shortage, have been usually instances in which such matters have been called to the attention of the court prior to confirmation and payment, and while the sale was under the control of the court.

ACTION by J. W. Peacock against Ida Barnes and others, heard by *Judge W. B. Councill* upon the pleadings at the February Term, 1905, of the Superior Court of WILSON County. From a judgment overruling the demurrer, the defendants appealed.

PEACOCK *v.* BARNES.

F. A. Woodard and *Pou & Finch* for the plaintiff.
Connor & Connor for the defendants.

CLARK, C. J. Certain lands of Harris Winstead, deceased, were sold to make assets to pay debts by a commissioner appointed by the court in that proceeding. The net proceeds were applied to the discharge of sundry mortgages upon the land and the surplus was divided between his heirs at law—two daughters—and was invested in real estate. Other real estate of said Winstead was duly partitioned between his said daughters and devisees. At the sale of the land by the commissioner aforesaid to make assets, lot No. 5 was purchased by the plaintiff at the price of $11.10 per acre, the commissioner representing that said lot contained 416 acres and bids being asked for said land at so much per acre. The plaintiff Peacock paid for said tract the sum of $4,616.60 being the price, calculating 416 acres at $11.10 per acre. Subsequently he ascertained that the tract in truth contained only 320 acres, making a deficiency of 96 acres by reason of which at $11.10 per acre he had overpaid $1,065.60. For the recovery of this sum with interest thereon, this action is brought and plaintiff asks that he be subrogated to the rights of the creditors, whose debts were discharged to the extent of said $1,060.60, and that the land bought with the surplus of the proceeds from said sale, and the other realty of said Winstead in the hands of his devisees, be sold by a commissioner that he may be reimbursed the aforesaid sum overpaid by him in the purchase of lot No. 5.

The defendant demurs on the ground that no cause of action was stated because the complaint does not aver that the number of acres was falsely or fraudulently misrepresented by the defendants or the commissioner, nor that either of them knew that the number of acres in lot No. 5 (whose boundaries were correctly given in the complaint in the proceedings to sell the land) was intentionally stated incorrectly

in the complaint, nor that there was an intent to deceive, nor is it averred that Peacock exercised due care to ascertain the number of acres before making such purchase and payment, nor is it alleged that any of the defendants were in possession of any information as to the number of acres, which was not communicated to the plaintiff.

The demurrer was properly overruled. This is not an action for breach of warranty, nor for fraud and deceit in the sale of land by the commissioner. In such action the complaint would be fatally defective for failure to make the averments whose lack is pointed out by the demurrer. It is also true that there is no implied warranty in the sale of real estate when made otherwise than by judicial decree, either as to quantity, title or incumbrance. *Barden v. Stickney,* 130 N. C., 62, and that the cases in which the courts have relieved the purchaser at a judicial sale by reason of a defect of title or shortage have been usually instances in which such matters have been called to the attention of the court, prior to confirmation and payment and while the sale was under the control of the court. Here, if the purchaser is shown to have been negligent or guilty of *laches* in not sooner ascertaining the shortage, or in failing to act promptly upon ascertaining such fact, he would have no standing in a court of equity. But upon the plaintiff's averments admitted by the demurrer, the purchaser relied upon the representations of the commissioner appointed by the court. The bid made and accepted was $11.10 per acre. That fact both sides understood. That was the essence of the contract of sale. It was a mutual mistake, so far as appears, that in calculating the amount of the bid, the purchaser was charged and paid for 96 acres more than he had purchased. It is still in the power of the court to correct the error and the defendants will suffer no prejudice therefrom.

When the case goes back, it will be open to the defendants to deny the shortage, or set up *laches* of the plaintiff or any

other defense they may be advised. We do no more than to hold that a cause of action is set up by the complaint, in seeking to correct an overpayment by reason of an error in calculating the amount due for land bought at a judicial sale at which the land was put up and sold by the acre, when there is no *laches* shown or averred as to the purchaser, and no change of condition or other cause by reason of which correction of the error by the court would work a prejudice to those for whose interest the land was sold.

No Error.

CONNOR, J., did not sit on the hearing of this appeal

YARBOROUGH v. HUGHES.

(Filed October 3, 1905).

Contracts—Reformation and Cancellation—Attorney and Client—Trustees—Usurious Transaction—Documentary Evidence—Presumptions from Failure to Produce Evidence—Notice to Produce—Partial New Trial.

1. Where the plaintiff's land was advertised for sale under a deed of trust and prior to the sale the defendant made a contract with the plaintiffs, agreeing to buy the land for himself with the stipulation that he would sell it to the plaintiffs for the amount of the purchase money paid by him, "with a reasonable advance thereon," as a profit to himself, the total sum to be divided into three installments, and when the installments were paid in full, the defendant should convey the land to the plaintiffs, the full agreement to be reduced to writing after the sale; and the defendant bought the land at the sale for $1,475, and he and the plaintiff entered into a contract containing substantially the above stipulations, except that it fixed the amount of the purchase money at $2,115, *held*, that the plaintiffs have no equity to cancel or to reform the contract, there being no suggestion that defendant occupied any fiduciary relation to them at the time, or that there was any fraud practiced, and no issue asked as to the reasonableness of the price.

2. It is not reversible error for the court to refuse to give an instruction in response to a prayer, where it appears that it was afterwards given by the court in its charge.

3. Where the defendant trustee in a deed of trust was advised by his attorney that he could not buy at his own sale, and the attorney said that he could not represent him at all if he was expected to represent D, a prospective purchaser, but the attorney prepared the advertisement of sale as a courtesy to defendant, and after that became the attorney of D, having received a letter from the latter requesting that he act for him at the sale, and he further testified that he had completely severed his connection with the plaintiff as his attorney and represented D alone at the sale, it was proper for the court to refuse to instruct the jury that the attorney was in law the attorney of the defendant and D.

4. The profit realized by the defendant, even if excessive, would not amount to usury, unless it was a mere device to cover and conceal an usurious transaction, and this would depend upon the intent with which the increase was exacted and in the absence of a finding of unlawful intent, the transaction will not be declared usurious.

5. Where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case.

6. Where the pleadings themselves are notice to a party of the importance of certain writings in his possession, as evidence, notice to produce is not necessary. The failure to produce on notice merely increases the strength of the presumption or inference, or adds weight to the evidence, if any, offered by the other side as to their contents.

7. Where two issues are independent of and clearly severable from the others, it presents a proper case for the exercise of the discretion of this court to restrict the new trial to said two issues.

ACTION by A. L. Yarborough and others against W. T. Hughes and M. L. T. Davis, heard by *Judge W. B. Councill* and a jury, at the April Term, 1905, of the Superior Court of

FRANKLIN County. From a judgment for the defendants, the plaintiffs appealed.

This action was brought to set aside a sale of land made by the defendant, W. T. Hughes, under the power given in a contract between him and the plaintiffs, dated April 26, 1902, the other defendant, M. L. T. Davis, having purchased the land at the sale and received a deed therefor from his co-defendant.

Plaintiffs alleged that the defendants were jointly interested in the contract containing the power, although on its face it appears to have been made by them with W. T. Hughes alone, and that the sale under the power was in fact and in law conducted by W. T. Hughes, through his attorney, and the land bid in by the same attorney in the name of Davis, but really for the use and benefit of Hughes or for the joint benefit of Hughes and Davis, who were at the time co-partners in trade.

The facts necessary to be stated for an understanding of the case are these: Joseph Branch, an ancestor of the plaintiffs, other than the husbands of those who are married and the widow of Branch, was at his death the owner of the land, and after his death his heirs to whom it had descended (or some of them who had received a deed from J. M. Allen, purchaser at the administrator's sale under a prior agreement with him), conveyed it to F. S. Spruill, as trustee, to secure certain debts of Jos. Branch, and perhaps some other debts, with power of sale in case of default. Mr. Spruill sold the land in accordance with the terms of the deed of trust and W. T. Hughes became the purchaser at the price of $1,475. Plaintiffs allege that before this sale Hughes had agreed to buy the land in for them, and that the transaction should be treated either as a loan of the amount of the purchase money or as a purchase by him for them, with the right to redeem or buy it back on paying the amount of the bid and interest; but a written contract, dated March 22, 1902, was put in evi-

dence; the substance of which was that Hughes agreed to buy the land for himself with a stipulation that he would sell it to the plaintiffs for the amount of the purchase money paid by him "with a reasonable advance thereon" as a profit to himself, the total sum to be divided into three equal instalments, one of which was to be paid each year for the next three years as rent, and it was further agreed that when the three instalments were paid in full, Hughes should convey the land to the plaintiffs. There was a stipulation in the contract for a lien on the crops and a clause of forfeiture and a power of sale if default was made in the payment of any one of the instalments of rent or purchase money. It was further provided that the full agreement should be reduced to writing after the sale by Mr. Spruill, as trustee, which was then advertised for April 7, 1902. There was also in evidence a written agreement purporting to be the one provided for in the paper writing just mentioned. It contained substantially the same stipulations, except that it fixed the amount of the purchase money at $2,115, to be divided into three equal instalments and paid as above provided. There were other terms, not necessary to be mentioned. This contract was duly acknowledged by all of the parties before the clerk. Plaintiffs alleged that they had made certain payments on the debt to Hughes, reducing the amount of it to $1,185.08. They having defaulted in the payment of the instalments according to the contract, Hughes advertised and sold the land under the power and it was purchased by his co-defendant Davis. Issues were submitted to the jury and the answers thereto were as follows: 1. Hughes paid Spruill, trustee, for the land, $1,175. 2. Plaintiffs paid to Hughes in 1902 over and above supplies furnished to them by him $516.85. 3. The annual rental value of the land is $225. 4. The value of the wood cut and removed by defendants $10. 5. The land brought at the sale by Hughes under the power, December 22, 1902, $1,692. 6. Defendants were not mutually interested

in the purchase of the land at the sale of April 7, 1902, by F. S. Spruill. 7. Defendants were not mutually interested in the purchase of the land at the sale of December 22, 1902. And (reversing the order of the last two issues), 8. Davis was represented by Mr. Ruffin, as attorney, at the sale of December 22, 1902. 9. The said attorney did not represent Hughes at that sale. Judgment was entered for the defendants upon this verdict, and the paintiffs excepted and appealed.

W. M. Person and *T. T. Hicks* for the plaintiffs.
F. S. Spruill for the defendants.

WALKER, J., after stating the case: We may assume for the sake of the argument, if not for all purposes, that the written agreement between the plaintiffs and Hughes, dated April 26, 1902, is a contract to sell or to make title upon payment of the purchase money and compliance with the other stipulations, notwithstanding that it has some of the usual terms of a lease expressed in it. *Puffer v. Lucas,* 112 N. C., 377; *Clark v. Hill,* 117 N. C., 11; *Mfg. Co. v. Gray,* 121 N. C., 168; *Hervey v. Locomotive Works,* 93 U. S., 664. The plaintiffs therefore had the right, or, after default, the equity to redeem the premises by paying the purchase money and in other respects complying with the agreement, and the defendant Hughes had the right to foreclose by sale when there was any default. The contention of the plaintiffs thus far may be admitted, and the case was really tried on the plaintiffs' theory. They have therefore substantially had the full benefit of the principle involved in their second prayer. The plaintiffs' allegation that Hughes bought upon the promise that he would convey to them on payment of the amount of his bid and interest, is not sustained. There was no issue upon this allegation, and indeed it seems to have been abandoned or at least waived for the present. They further claim

that the contract of April 26, 1902, was onerous, oppressive and therefore inequitable, and that the court should not enforce it. There was no issue asked or submitted which presented this contention. By the agreement of March 22, 1902, Hughes was to buy at the approaching sale and convey to plaintiffs upon payment of his outlay and a reasonable advance thereon, which it was agreed should be the purchase price to be paid in three equal instalments. We do not see why he did not have the right to make this contract with the plaintiffs, or how it was onerous or unconscionable for him to do so. They had no money and requested him to bid in the land, as he had money for the purpose. He was to buy for himself, so says the contract, and to sell to them for a reasonable profit on the transaction. There is no suggestion that he stood in any position of trust or confidential relation to them at the time, or that there was undue influence used or any fraud practiced to obtain the contracts. Defendants agreed in the preliminary contract to pay a fair and reasonable amount over and above his bid, and by the contract executed in April they virtually affirmed that the amount fixed was reasonable. Nothing else appearing we are unable to hold that the plaintiffs have any equity to cancel or to reform the contract or to pay a less sum than it calls for. They asked for no issue as to the reasonableness of the price charged by Hughes, and we must conclude that this matter was fairly and finally adjusted by the parties in April, in accordance with their previous understanding as evidenced by the agreement made in March. If the price was reasonable and there was no fraud or other vitiating element, the contract must stand both in law and in equity. The first, third and sixth prayers of the plaintiffs were therefore properly refused.

Upon the sixth and seventh issues, the plaintiffs requested the court to charge the jury that they might consider the manner of keeping the accounts by defendants, it appearing that certain items paid by plaintiffs on the debt were entered on

the books in the name of W. T. Hughes & Co., and that a receipt for rents was given to David Perry, one of the plaintiffs, in the name of the firm, and the supplies entered as furnished by the firm, which was composed of W. T. Hughes and M. L. T. Davis. This instruction, it appears, was not given in response to plaintiffs' prayer, but by referring to the charge we find that it was afterwards given by the court, and the contentions of the parties and the evidence bearing thereon fully explained to the jury. There was therefore no reversible error in refusing to give that part of the instruction embraced by the seventh prayer of plaintiffs, which related to this matter.

Before considering the remaining portion of this prayer, we will dispose of two other exceptions, as it is more convenient to treat of them in this order.

In the fourth prayer the plaintiffs requested the court to instruct the jury that the testimony of the attorney, if believed, constituted him in law, at the time of the sale of December 22, 1902, the attorney of Hughes and Davis, and for that reason the sale was void and passed no title. The testimony was to the effect that Hughes told his attorney that there would be a default, and that if there was he would sell the land. The attorney then advised him that he could not buy at his own sale, as Hughes had intimated that the land might not bring the amount of the debt and he would have to bid it in. Hughes then suggested the names of several parties who would bid, and he was told by his attorney that he could not buy directly or indirectly, and that it must be some one not interested in the sale. Hughes then said Mr. Davis had money for investment and that he would suggest to him not to let the land be sold at less than its value. The attorney then said that he could not represent him at all, but that he must go there and make the sale himself, and added that if he was expected to represent Mr. Davis, he could not conduct the sale, as he could not, being attorney for Hughes, make a

bid for anybody else. He then prepared the advertisement of sale, as a courtesy to Hughes, and after that became the attorney of Davis, having received a letter from the latter requesting that he act for him at this sale, limiting his bid to $1,700, and promising to remit the cash should he become the purchaser. It is not necessary to recite all the other testimony on this point. It will suffice to add that the witness further testified, in substance that he had completely severed his connection with Hughes, as his attorney, and represented Davis alone at the sale. The jury accepted this version of the transaction, as they found that the witness did not act for Hughes at the sale, but solely for Davis. There being evidence to sustain the verdict, it must be an end of the matter.

As we construe the evidence, the conduct of the attorney was perfectly correct both in law and in fact. When it appeared to him from what Hughes said that he expected him to represent him at the sale, he promptly advised him of the law on the subject, and of the impropriety of his acting in a dual capacity and representing opposing, if not conflicting interests, and immediately divested himself of all obligation to Hughes as his attorney and ceased to act for him. It was a question of fact to be determined by the jury under the proper guidance of the court. The exceptions to the refusal of the court to give the instructions contained in the fourth and fifth prayers are therefore overruled.

After the verdict had been returned, the plaintiffs requested the court to adjudge upon the verdict that the defendant Hughes had received from the plaintiffs $730.85 of unlawful and usurious interest and that judgment be entered for double that amount. This prayer was properly refused by the court. The contract of March 22, 1902, expressly provided that Hughes should buy the land at the sale of April 7, and sell it to the plaintiffs upon the terms we have already set forth. He was to receive a reasonable advance on the amount of his bid, the total amount to be divided into three

equal instalments to be paid as stipulated. Afterwards, on April 26, 1902, the plaintiffs freely, voluntarily and solemnly agreed, without any serious allegation, and certainly no issue, as to fraud or undue influence in procuring the instrument, or other equitable element to vitiate the contract, or to prevent its full operation, that they would pay $2,115 for the land, and there is evidence tending to show that they had proposed to pay Hughes $2,400 for the land, he replying to this proposal "that $2,100 and the costs was all he wanted." There is further evidence that they importuned him to buy and then sell to them, and that Hughes had at the time been offered $2,000 in cash for the land. The only question was whether the price fixed in the contract was a reasonable advance on the bid, and we do not well see how this question could be raised, as they had agreed in writing that it was, and had promised to pay it. If there was no ground upon which to assail that agreement and have it reformed and set aside, it must be binding upon them, and no equity for either reforming or cancelling the agreement has been established by the verdict. The profit realized by Hughes, even if excessive, would not amount to usury, unless it was a mere device to cover and conceal an usurious transaction. It is less difficult to decide what is usury, when there is a loan of money, than in a case like this one. Interest is the premium allowed by law for the use of money, while usury is the taking of more for its use than the law allows. It is an illegal profit. 4 Blk., 156. How can we say, on the face of this transaction, that as a matter of law it is usurious? If it was a reasonable advance, it surely cannot be illegal, for it was not excessive, and even if exorbitant it must have been resorted to as a mere cloak for usury. It would therefore depend upon the intent with which the increase was exacted. Referring to a state of facts much like those in this record, Tyler, in his work on Usury, p. 92, says: "The inquiry often arises whether the transaction was a real sale in the regular course of business

or a colorable sale, with intent to disguise a loan and evade the statute against usury; but if the case is found to be a sale and not a loan, the courts uniformly hold that usury cannot attach, and indeed a sale can in no case be *prima facie* evidence of usury; for it is valid unless it be a loan in disguise, and the burden of proof lies on the party claiming it to be usury, and it is necessary for him to show the circumstances which bring it within the statute." In cases like this, the intent is the essential element of usury, and this is of course a question of fact to be decided by the jury under proper instructions from the court. In this case the unlawful intent is not found.

We now come to the consideration of the exception to the refusal of the court to give the latter portion of the seventh prayer, which is as follows: "The jury may consider the fact that the writings, if any, by which the land was paid for at or after both sales are presumably in possession of defendants, and would throw light on the nature of the transaction, and as tending to show that such writings, if produced, would make against the defendants on said issues," referring to the 6th and 7th. This exception has presented more difficulty than any other. The plaintiffs notified the defendants to produce the papers described in the prayer, but the notice was not served on Davis, and was served on Hughes late in the trial. If the correctness of the prayer depended upon the serving of notice, we might, perhaps, overrule the exception on account of the lateness of the time of service. But we do not think it does. The answer itself was sufficient notice to the defendants of the importance of these writings, as evidence, to them. It is the failure to introduce testimony, oral or written, which should be valuable to a party, that raises the inference against him that, if introduced, it would be detrimental to his case. The relevancy and weight of such a fact as evidence is established by one phase of the maxim *omnia praesumuntur contra spoliatorem*, which is said to rest

upon logic, and the presumption it raises to be reinforced by our every day experience that men do not as a rule withhold from a tribunal facts beneficial to themselves. It is therefore laid down in the books as a well settled principle that where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case. The failure to produce on notice, merely increases the strength of the presumption or inference, or adds weight to the oral evidence, if any, offered by the other side as to their contents Some of the authorities say that the presumption does not constitute independent and substantive evidence of a fact, but we need not decide how this is. The same rule applies to the failure to call an available witness with peculiar knowledge of the fact to be established. The subject is fully and clearly treated in 16 Cyc. of Law, pp. 1059-1065. It has been applied in our courts to the case of a litigant in a civil action who fails to appear as a witness in his own behalf and who is fixed with a knowledge of the facts. *Goodman v. Sapp*, 102 N. C., 477, and cases therein cited, which illustrate the application of this rule of evidence. In *Attorney-General v. Dean of Windsor*, 22 Beav., 706, it is said that evidence is always to be taken most strongly against a person who keeps back a document. Broom, in his Legal Maxims, says (8 Am. Ed.), p. 938: "If a man by his own tortious act withhold evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted, for where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him." And again: "This rule is founded on a sort of presumption that there is something in the evidence withheld which makes against the party not producing it."

and he puts the case of the nonproduction of a deed or other written instrument. Broom, *supra*, p. 940. See also 3 Elliott on Evidence, section 1967; 1 Greenleaf on Ev., 16 Ed., section 37, note 1, and section 195c, and note 1. The text writer last cited says that the conduct of the party withholding the evidence is attributed to his supposed knowledge that the truth would have operated against him, and the nonproduction of the evidence is a significant fact for the consideration of the jury. This court applied the rule in *Black v. Wright*, 31 N. C., 451, saying that it is classed among the strongest circumstantial proofs against a person that he omits to introduce evidence which should properly come from him. *State v. Atkinson*, 51 N. C., 67; analogous cases are *Hawkins v. Alston*, 39 N. C., 147; *Satterwhite v. Hicks*, 44 N. C., 109. The court refused to apply the rule in *Gudger v. Hensley*, 82 N. C., 486, (affirmed in *Scott v. Elkins*, 83 N. C., 426,) in regard to lists supposed to have been annexed to the Blount grant, but for the reason that the proof showed that they were inaccessible. Authorities applying the rule of presumption upon the ground that the document, if produced, would probably militate against the party who withholds it or could produce it, are *Westfelt v. Mfg. Co.*, 69 N. E. Rep., 169, *Darby v. Roberts*, 22 S. W. Rep., 529. It is also applied in *Johnson v. Levy*, 109 La., 1038, where the principle is stated to be that when effective proofs are within the reach of a party and he fails to produce them, a presumption is raised that they would, if produced, make against him. This is very nearly the language of the prayer in this case. Usually the nonproduction of papers called for in a notice has no other legal effect than to allow the opposite party to prove their contents, but when a party, under the obligation to sustain his defense by proof, has possession of the best evidence and fails to produce it but attempts to sustain it by inferior evidence, it authorizes the inference that he does not furnish the best, because it would injure instead of benefiting his

cause. *Ins. Co. v. Evans,* 9 Md., 1. Strongly supporting the maxim in its general application will be found the cases of *Clifton v. U. S.,* 4 How., 242, and *Runkle v. Burnham,* 153 U. S., 216; *Roe v. Harvey,* 4 Burrows (opinion by *Lord Mansfield*), 2484. There surely was evidence in this case for the jury upon the question whether Hughes and Davis were jointly interested in the land and in the purchase at the sales, and it was so considered in the trial at the court below, as will appear from the charge, in which His Honor so lucidly stated the contentions of the respective parties and arrayed the evidence in support of them. The case was such as to call for a full disclosure by the defendants through the medium of the best attainable evidence. We think the instruction as to the nonproduction of the papers should have been given. It may be that the defendants will be able to show that, after due and diligent search prosecuted in good faith, they are unable to produce them or they may in some other manner explain away any inference to be drawn from the failure to offer them in evidence. If there is a fair, frank and satisfactory explanation, the presumption may be laid out of the case and the defendants will not be deprived of any right to which they are otherwise entitled; if, however, no satisfactory explanation is forthcoming, the maxim of the law will apply, and the jury must pass upon the case, aided by the presumption, giving to it such force and effect as they may think it should have under all of the facts and circumstances. The Pizarro, 2 Wheat., 227; *State v. Phifer,* 90 N. C., 721. The court erred in not giving the said instruction, for which there must be a new trial, but it will be confined to the sixth and seventh issues, as we deem this a proper case for the exercise of our discretion to restrict the scope of the new trial. The other issues are independent of these two and clearly severable from them. If the jury find for the plaintiffs upon the sixth and seventh issues, or, perhaps, upon either of them,

further proceedings must be had to adjust and enforce the plaintiffs' equity. If the decision is the other way and is free from error, it will put an end to the case.

New Trial.

DONLAN v. TRUST CO.

(Filed October 3, 1905).

Builder's Contracts—Sureties—Elements of Damage—Services in Supervising—Lawyer's Fee—Loss of Rents.

1. Where a contractor failed to complete plaintiff's houses according to contract, and the latter completed them himself by direction of the defendant, who, as surety for the contractor, covenanted to pay all damages which should occur by the failure of the contractor to comply with his contract, *held*, that the defendant is not liable for a deficiency arising from the plaintiff's having accepted drafts from the contractor for labor and material for more than enough to absorb the sum which was due the contractor.

2. The court erred in holding that $100, which was admitted to be a reasonable charge for the plaintiff's services in supervising the completion of the houses, was a proper charge only against the contractor. It was damages chargeable against the defendant surety, and could not be retained by the plaintiff out of the funds due the contractor, in preference to claims for labor and material.

3. In an action against the defendant as surety for a defaulting contractor, a charge made by the plaintiff for lawyer's fee was properly disallowed.

4. The damage sustained by the plaintiff for loss of rents which he should have received had the contractor completed the houses by the time specified in the contract, directly flows from the breach of the builder's contract, and is within the terms of the defendant's contract of suretyship.

ACTION by Timothy Donlan against American Bonding & Trust Company, heard by *Judge O. H. Allen*, upon excep-

tions to report of referee at the April Term, 1905, of the Superior Court of NEW HANOVER County. From the judgment rendered, both parties appealed.

E. K. Bryan for the plaintiff.
Iredell Meares for the defendant.

CLARK, C. J. The defendant as surety to one Vollers, who had contracted to build three houses for the plaintiff by September 15, 1899, covenanted to pay all damages which should accrue by failure of said Vollers to comply, in all respects, with his said contract. On September 20, 1899, the plaintiff notified the defendant that the work was not completed and, later, notified the defendant that it might complete the work, as it was entitled to do, under its bond. It did not choose to do so, but told the plaintiff to complete the houses, which he did at a cost of $460.25 by the referee's report. At that time, Vollers was indebted for labor and material on the houses in the sum of $874.04, for which the plaintiff had accepted drafts from Vollers and has since paid. Vollers owed, besides other amounts for labor and material, of which the plaintiff had then no notification. After deducting $460.25, cost of completing the houses, from the $1,120 (which was the balance due Vollers had he completed the work), there was only $659.75 to be applied on the $874.04, but the difference cannot be charged to the defendant, as it was the plaintiff's misfortune or officiousness that he accepted drafts for more than enough to absorb the sum which would be due the contractor. Code, section 1802.

It was admitted that $100 was the reasonable worth of the plaintiff's services in supervising the completion of the houses and the judge properly allowed it, but erred in holding it to be a proper charge in favor of the plaintiff only against the contractor. On the contrary, it was damages chargeable against the surety, for it was reasonably in con-

templation of the surety that there would be such supervision required if the contractor should abandon the work. No compensation to the contractor for his services could be allowed in preference to the claims of labor and material to be satisfied out of the money due by the plaintiff, and of course no allowance to one doing the supervision in lieu of the defaulting contractor, would have such preference as against them. It was not a preferred charge against the $1,120 in the plaintiff's hands, which he must or could deduct before paying for labor and material.. The $75 for lawyer's fee was properly disallowed.

The plaintiff was not bound for the indebtedness for material and labor beyond the balance due the contractor, Code, section 1802, and in accepting and paying beyond that sum, he was in his own wrong and cannot ask that the surety make him whole.

On the other hand, the judge finds, as a fact, that the plaintiff sustained as damages $298.33 for loss of rents which he should have received had the contractor completed the houses by the time specified in the contract. This damage directly flows from the breach of the builder's contract and is within the terms of the defendant's contract of suretyship. The judge properly gave the plaintiff judgment for that sum, but his judgment must be corrected by adding thereto the above sum of $100 for supervision of the work.

In the plaintiff's appeal, there is ERROR.

In the defendant's appeal, there is NO ERROR.

WEEKS v. WILKINS.

(Filed October 3, 1905).

Deeds—Quitclaim—Bargain and Sale — Estoppel — After Acquired Title—Warranty.

1. An ordinary quitclaim deed, containing no covenants, vests in the grantee only such title as the grantor was seized of at the time of the execution of the deed, and if such grantor subsequently acquires an outstanding title, it does not inure to his grantee in the quitclaim deed, but it is otherwise as to a deed of bargain and sale.

2. Where the plaintiff in 1863 executed together with six brothers and sisters a deed of bargain and sale for the joint consideration of $1,000, to certain land to the defendant, each grantor undertaking to convey the entire land in fee and the deed containing a joint as well as a several clause of warranty, but the privy examination of three of the grantors, who were married, was not taken; and in 1889 the said married women executed a deed to the plaintiff, *held*, that the plaintiff is estopped from setting up against those claiming under the deed of 1863 the outstanding title thus acquired.

3. An estoppel works upon the estate which the deed purports to convey and binds an after acquired title as between parties and privies. In cases where the deed contains a warranty, the grantee and those claiming under him will not be remitted to an action on the covenant for damages.

ACTION by Samson Weeks against J. T. Wilkins and others, heard by *Judge O. H. Allen* upon an agreed state of facts, at the May Term, 1905, of the Superior Court of SAMPSON County. From a judgment awarding the plaintiff four-eighths of the land, the defendants appealed.

F. R. Cooper for the plaintiff.
John D. Kerr for the defendants.

BROWN, J. This case was before the court at Spring Term, 1904, and is reported in 134 N. C., at page 517.

The facts are fully stated in the opinion of *Mr. Justice Connor*. It is a matter of surprise that the interesting question of estoppel discussed upon this hearing should not have been presented upon the former hearing. It is decisive of the case and bars a recovery by plaintiff of any part of the land conveyed in the deed from Esther Weeks and seven of her children, on June 1, 1863, to Brittain A. Edwards. The deed was never signed or executed by Betsy Ann Raynor, the remaining child, nor was the privy examination of the three married women, Susan Williford, Pherebe Williford and Mary J. Jones, ever taken. During 1899 all the children of Esther Weeks, including said married women, executed a deed to the plaintiff, Samson Weeks, for the same land. We are of opinion that the plaintiff is estopped from setting up the outsanding title thus acquired against the defendants who claim under the deed to Brittain Edwards. The husbands of the married women did not sign this latter deed and no privy examination was taken. The deed is void as to them and is to be treated just as if neither of the *femes covert* had signed it. As to Samson Weeks, the deed has been adjudged in this cause to be a valid and binding conveyance; and it is sufficient in form to estop plaintiff from setting up against those claiming under it the outstanding title thus acquired.

An ordinary quitclaim or release deed, containing no covenant whatever, vests in the grantee only such title as the grantor was seized of at the time of the execution of the deed. If such grantor subsequently acquires an outstanding title, it does not inure to his grantee in the quitclaim deed. The deed of June 1, 1863, is not in form a quitclaim or release. It is a bargain and sale for the joint consideration of $1,000, and purports to convey to the grantee in fee a good and indefeasible title to the entire 208 acres therein described. It makes no mention of the individual interest of the grantors, but it is a joint conveyance of the entire body

of land, in which each grantor undertakes to convey the entire land in fee to the grantee. The deed contains a clause of warranty wherein the grantors jointly, as well as severally, warrant and defend to the grantee, his heirs, etc., the "above bargained land and premises from the lawful claims of any and all persons whatsoever." At the time Samson Weeks executed the deed of June 1, 1863, he was a minor, but this court has held that his deed was voidable and not void, and that consequently his failure to disaffirm during the thirty-six years between June 1, 1863, and June 1, 1899, made the deed a valid and binding conveyance on his part. It may be possible that the minority of plaintiff, if pleaded, would bar a recovery in an action upon the contract of warranty for damages for an ouster, but, if that be true, it would not prevent the operation of the entire deed as an estoppel. A rebutter arises from a warranty. Estoppels arise in cases where there may be no warranty. While it might be that a personal recovery cannot be had upon this warranty, yet it is a part of the instrument and may be considered as showing the real intent and purpose of the parties in respect to the land conveyed. As between the parties to a deed of bargain and sale, the seizin is to be considered in law as passing because the bargainor is estopped from showing that he was not seized of the title which the deed purports to convey, and if he was actually seized of such estate it was transferred by the statute of uses. As *Judge Henderson* tersely says, in *Taylor v. Shufford,* 11 N. C., 129: "As between the parties the bargain and sale shall pass what it purports to pass; as to strangers what it actually does pass." This principle is founded in justice and reason. The grantee is necessarily influenced in making the purchase by the quality and extent of the estate which purports to be conveyed by the deed, and hence the grantor in good faith and fair dealing should thereafter be precluded from gainsaying it. Where the conveyance purports, as in this case, to pass a title in fee

to the entire body of land, the grantor is estopped thereafter to say it does not. The consensus of all the authorities is to the effect that where the deed bears upon its face evidence that the entire estate and title in the land was intended to be conveyed, and that the grantee expected to become vested with such estate as the deed purports to convey, then, although the deed may not contain technical covenants of title, still the legal operation and effect of the deed is binding on the grantors and those claiming under them, and they will be estopped from denying that the grantee became seized of the estate the deed purports to vest in him. *Van Rensselaer v. Kearney*, 52 U. S., 323, is a leading case in which *Mr. Justice Nelson* states the doctrine with great clearness and wealth of learning. *Irvine v. Irvine*, 76 U. S., 625. The true principle is that the estoppel works upon the estate which the deed purports to convey and binds an after acquired title as between parties and privies. In cases where the deed contains a warranty, the grantee and those claiming under him will not be remitted to an action on the covenant for damages. "When one assumes by his deed to convey a title and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title and turn his grantee over to a suit upon his covenant for redress." *Smith v. Williams*, 44 Mich., 240, 242; *Cace v. Green*, 53 Mich., 615; *Ryan v. U. S.*, 136 U. S., p. 88; *Hassell v. Walker*, 50 N. C., 270; *Hallyburton v. Slagle*, 132 N. C., 947. From these and many other authorities it seems to be plain that upon this record the plaintiff is not entitled to recover. The judgment of the Superior Court is

Reversed.

DANIELS v. HOMER.

(Filed October 17, 1905).

Fish and Fisheries -Police Power—Abatement of Nuisance—Seizure and Sale of Nets—Constitutional Law.

1. Chapter 292 of the Acts of 1905, making it unlawful to set or fish any nets in certain sections of Albemarle and Pamlico Sounds, from January 15 to May 15 in each year, and providing that any person who shall violate said act shall be guilty of a misdemeanor, and further providing that the Oyster Commissioner shall seize all nets setting or being used in violation of said act, sell the same at public auction and apply the proceeds to the payment of cost of removal and pay any balance to the school fund, is a constitutional exercise of the police power.

2. There is no individual or property right of fishery in the waters of Albemarle and Pamlico Sounds, but such right rests in the State, and is subject absolutely to such regulations as the General Assembly may prescribe and can be exercised only at such times and by such methods as it may see fit to permit.

3. Fishing in waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets subject to the right of their owner to contest the fact of his violation of the law by a proceeding of claim and delivery, or by injunction to prevent sale, or by action to recover the proceeds of sale and damages.

CONNOR and WALKER, JJ., dissenting.

ACTION by B. T. Daniels against J. Q. Homer, heard by *Judge G. W. Ward*, upon an agreed state of facts, at the Spring Term, 1905, of the Superior Court of DARE County. From a judgment in favor of the defendant, the plaintiff appealed.

B. G. Crisp, Aydlett & Ehringhaus and *Gilliam & Gilliam* for the plaintiff.

W. M. Bond for the defendant.

CLARK, C. J. The General Assembly of 1905 enacted chapter 292, "To regulate fishing in Albemarle and Pamlico Sounds and waters connected with them." The first five sections of that chapter define and regulate the manner of fishing in various sections of the sounds. Section 6 (marked 5 in the printed act) is as follows: "That it shall be unlawful for any person to set or fish any net or appliance of any kind for catching fish within one mile on north or south side of a line five miles long, running west from center of New Inlet or Oregon Inlet, or on north or south side of a line five miles long, running northwest from center of Hatteras Inlet." Section 7 makes the act operative only from January 15, to May 15, in each year—a "close" season of four months. We were told on the argument, and it was not controverted, besides it is a matter of common knowledge, that no small part of the sustenance and business interest of the people living adjacent to Albemarle and Pamlico Sounds and the waters connected therewith, are dependent upon catching fish, whose supply has so greatly decreased that the United States Government has established and is operating at large expense, a fish hatchery at Edenton for the purpose of putting into the waters of Albemarle Sound millions of young shad and other fish each year, to replenish the diminishing supply; that the habit of the fish is to go out to sea and at the end of three years they return to the waters where they were liberated for the purpose of spawning, and that if nets are set across the inlets through which they return, the fish are either caught or detained beyond the spawning season and the supply of fish in Albemarle and Pamlico Sounds and connecting waters will be thereby almost entirely destroyed and the Government hatchery at Edenton will become a useless expense and will doubtless be abandoned.

With a view of protecting the rights of the public against the cupidity of those who for their own profit would "kill the goose that lays the golden egg" for the benefit of a whole sec-

tion of the State, whose people are so largely interested in the fish industry, the General Assembly of 1905 enacted the above named chapter, creating a close season of four months during which the fish may freely return to our waters to lay their eggs, and for the purpose of enforcing its execution, when the profits arising from its violation would be a great temptation thereto, deemed it necessary to enact sections 8 and 9 of said act as follows: "Sec. 8. That any person who shall violate any section or provision of this act shall be guilty of a misdemeanor, and upon conviction in any county opposite the place at which said act is done shall be fined or imprisoned at the discretion of the court."

And inasmuch as pending trial and conviction, the destruction of the fish would go on to the great profit of the violators and to the irreparable injury of the public, the General Assembly thought proper to add to the abatement of the nuisance the penalty of the loss of the nets—the means by which the law was violated—in the following: "Sec. 9. That it shall be the duty of the Oyster Commissioner or Assistant Oyster Commissioner, whenever an affidavit is delivered to him, stating that affiant is informed and believes that said act is being violated at any particular place, to go himself or send a deputy to such place, investigate the same, and they shall seize and remove all nets or other appliances setting or being used in violation of this act, sell the same at public auction, and apply proceeds of sale to payment of cost and expenses of such removal, and pay any balance remaining to the school fund of county nearest to where offense is committed."

An affidavit by fourteen citizens having been made 25 March, 1905, that B. T. Daniels was violating the aforesaid act by setting two nets in the waters of Pamlico Sound at the end of Croatan Sound, and also east of Roanoke Marshes Light House (where the fish returning to the sound through Hatteras Inlet would be caught during the "close" season pro-

vided by law), the defendant, the Assistant Oyster Commissioner, notified said Daniels that he would seize said nets on 1 May, which nets were in water where the aforesaid law prohibited the setting or fishing said nets (as the plaintiff admits), and against the protest of said Daniels, did take said nets out of the water and placed them on shore under guard, whereupon this proceeding for claim and delivery for the nets was instituted. The defendant avowed his purpose to sell the said nets and apply the proceeds to the cost of seizing and removing the same, and apply the surplus of the proceeds, if any, to the school fund of the county as provided by said act.

There is no individual or property right to fishery in the waters mentioned in the act. The right of fishery, as well as hunting, rests in the State, and is subject absolutely to such regulations as the General Assembly may prescribe, and can be exercised only at such times and by such methods as it may see fit to permit. *Hettrick v. Page*, 82 N. C., 65; *Rea v. Hampton*, 101 N. C., 51; *State v. Gallop*, 126 N. C., and cases there cited at page 983; and this right may be exercised a marine league out to sea, *Manchester v. Mass.*, 139 U. S., 240; and citizens of other States may be excluded, *McCready v. Va.*, 94 U. S., 391. As the plaintiff admits his nets were set in waters forbidden by the act, his counsel admitted that the seizure was legal, but denied the right of the defendant to sell the nets as provided in the statute. But the State was sole judge of the penalty it should impose for a violation of its laws. It thought proper here to make the loss of the instruments used in such violation a part of the penalty, possibly to prevent a repetition of the offense, or as a surer deterrent of its commission.

The plaintiff contends that though his property is admitted by him to have been used in violation of law at the time of seizure, that the statute imposing as a penalty the loss of such property is unconstitutional in that there was no pre-

vious notice and trial. But as the General Assembly could prescribe the loss of the nets as a penalty, and the offense is admitted, there is nothing to try. As was said in *Rea v. Hampton,* 101 N. C., at p. 55, "As the Legislature had the undoubted right to regulate the manner in which the right of fishing in Albemarle Sound should be exercised, the plaintiffs had no *right* to fish in its waters in any mode not allowed by law. The facts found show that they were fishing in violation of law, and it would be singular if they could ask the *law* to protect them in its violation." In *Rose v. Hardie,* 98 N. C., 44, a town ordinance was held valid which authorized all hogs running at large to be impounded and sold for the costs *and penalty.* Here the State made the penalty the forfeiture of the article used in violation of the act. In *Mowery v. Salisbury,* 82 N. C., 175, a town ordinance was sustained which made the penalty for failure to pay the tax on a dog the right to kill the dog. At common law any personal chattel that even accidentally caused the death of a rational being was forfeited to the sovereign and sold and the proceeds distributed to the poor, as a cart that ran over a person, a weapon and the like. They were styled deodands. 1 Blk. Com., 300. And no trial or conviction of any person was necessary.

But the plaintiff contends that he might not have been using his nets in forbidden water, and if so, he was entitled to have that question determined by a jury trial before his nets were sold. As the plaintiff admits that his nets were so being used on this occasion, the proposition becomes a mere academic question in this case. In view, however, of the importance of the matter being settled, and in accordance with the wishes of the parties, we pass upon the legal point raised.

It was not seriously controverted, and could not be, that an abatement of a nuisance must be summary and that a seizure can take place before any adjudication by legal process, the party having his remedy by proper proceedings for an illegal

seizure. In *Hettrick v. Page*, 82 N. C., 65, *Smith, C. J.*, held that fishing in waters, when prohibited by law was a public nuisance, and even a private individual if injured thereby, or indeed any one else, may remove the impediment.

But the plaintiff insists that before his nets are sold he is entitled to have the fact determined, by a court, whether he has incurred the penalty by doing the illegal act. So he has, but it can be asserted in this very action to recover the nets before sale, or after sale by an action to recover the proceeds of sale or damages, or upon advertisement of sale, an injunction to prevent the sale. He has his full remedy, but it does not include a continuance of the nuisance to his individual profit and the public detriment while the question of violation of the statute is being determined. The identical point has been determined, and by courts of the highest authority. By a statute in New York, very similar to ours, passed in 1880, fishing at certain places was prohibited and made punishable as a misdemeanor. This not proving sufficiently effective, an amendment in 1883 authorized any person to "abate and summarily destroy," and it was made the duty of any game constable to "seize, and remove and forthwith destroy" any "net, pound or other means or device for taking or capturing fish" in violation of any law, then or thereafter enacted, for the protection of fish. In the Court of Appeals of New York, *Lawton v. Steele*, 119 N. Y., 226, (s. c., 7 L. R. A., 134), the act was held constitutional, affirming the court at General Term. Upon writ of error to the U. S. Supreme Court, this was again affirmed, *Lawton v. Steele*, 152 U. S., 133, the court holding that the authority to summarily destroy nets used in violation of the law for the protection of fish, "is a lawful exercise of the police power of the State and does not deprive the citizen of his property without due process of law." After stating the absolute power of the Legislature to regulate fishing and to provide for the protection of fish, the court says: "Nor is a person whose property

is seized under the act in question, without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case, *Am. Print Works v. Lawrence*, 21 N. J. L., 248, 259, the party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional. Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act." This decision by the court charged as the final tribunal, with the construction and enforcement of the Fourteenth Amendment, should be conclusive.

The U. S. Supreme Court (152 U. S., 142,) further says: "It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture and are ordinarily used for a lawful purpose. This, however, is by no means a conclusive answer. Many articles, such for instance as cards, dice and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. * * * The power of the Legislature to declare that which is perfectly innocent in itself to be unlawful, is beyond question (*People v. West*, 106 N. Y., 293,) and in such case the Legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance." It further cites to same purport, *Weller v. Snover*, 42 N. J. L., 341, and *Williams v. Blackwell*, 2 H. & C., 33, which sustained acts for the summary destruction of fish baskets and traps

used to catch fish contrary to law. *Lawton v. Steele* has since been cited for this proposition as authority by a unanimous court. *Sentell v. Railroad,* 166 U. S., at p. 705.

Our Code, sections 1049, 1051, 1052 authorizes any police officer, constable, sheriff, justice of the peace, to summarily destroy any gaming table, etc., and the seizure of any money staked (which is not a nuisance *per se*, any more than the fishing net), one-half to belong to the person seizing it, and the other half to the poor of the county. This is cited by *Dick, J.*, in *North Carolina v. Vanderford*, 35 Fed., 286, in sustaining the summary seizure and destruction of a barrel of "blockade" whiskey, and a similar statute was held constitutional. *Garland v. State,* 71 Ark., 138.

Certainly gambling in the back room of some village hotel, or private house, or stable loft, is not as injurious as the destruction of the fishing industry, upon which depends to a large extent the prosperity of twenty counties, and whose importance has attracted the attention of the Federal Government and caused a large expenditure to restore the depleted stock of fish, an expenditure which would be in vain if the General Assembly is powerless to authorize the prompt abatement of fishing nets at the inlets during the months when the fish return to lay their eggs, or to authorize such penalties, including the forfeiture of the nets illegally used, as the representatives of the people may deem necessary to suppress the nuisance.

The same ruling, as in *Lawton v. Steele, supra,* was made in Wisconsin, in a very able opinion by *Cassoday, C. J.*, (1896) *Bittenhaus v. Johnston*, 32 L. R. A., 380. *Lawton v. Steele* has been recently quoted and followed. *Burroughs v. Eastman*, 101 Mich., 126, and *Osborn v. Charlevoix*, 114 Mich., 655; 13 Am. & Eng. Enc., (2nd Ed.), 573, 576, 579 and notes. The plaintiff relies on *Colon v. Lisk*, 153 N. Y., 188, 609, but that case fully recognizes and follows *Lawton v. Steele*, originally decided by the same court, and merely

holds that an extension of the same summary power to the seizure and sale of vessels was not necessitated by the same urgency as was requisite as to nets in the water and that there should be condemnation proceedings before sale. Presumably it were better as to articles of that value and nature, that the right to sell should be adjudicated before sale.

As to the nets, the plaintiff (had he not admitted his violation of law) without detriment to his rights could have contested the nets having been set within the forbidden limits or that they had been so used with his consent, or set up any other defense, in this proceeding of claim and delivery, or by an injunction to prevent a sale, or by action to recover the proceeds of sale and damages. On the other hand, the General Assembly had the power to authorize prompt abatement of the nuisance by seizure and sale of the nets, subject to the right of their owner to contest the fact of his violation of the law, by this, or any other of the remedies just enumerated.

As against the person actually creating the nuisance, it may be abated without notice. *Jones v. Williams*, 11 M. & W., 176; Garrett on Nuisances, 314. Such is the law, recognized even as far as India. Ratanlal & Dharajlal Eng. & Indian Law of Torts, 103. Besides in this case, notice was actually given before removing the nets, and the plaintiff neither removed nor offered to remove his nets from the forbidden waters, though given the opportunity to do so by the notice given him by the defendant. The plaintiff has had his day in court by this very proceeding in claim and delivery and the nets are not yet sold. It is no deprivation of any right that he is the actor, the plaintiff, since (as the United States Supreme Court said in *Lawton v. Steele, supra*,) the burden is on the defendant to justify the seizure. It is not a question of right but merely as to the form of legal procedure, whether the violator of the statute shall be plaintiff or defendant in the action, and as to that surely the Legislature is the judge.

As was said in State v. Lytle, 138 N. C., 741, "A statute will never be held unconstitutional if there is any reasonable doubt,"—citing *Sutton v. Phillips*, 116 N. C., 504. Can we say that an act is unconstitutional "beyond a reasonable doubt" when such legislation has been held constitutional by the Supreme Court of the United States and by the highest courts of New York, New Jersey and Wisconsin?

If the nets cannot be forfeited, then by having two sets of nets the plaintiff can replace his nets as fast as the officer carries the other off, and then in turn put in the first net when the second is seized. Thus the attempt to abate the nuisance would become a mere farcical race between the violator and the officer of the law. There is no analogy between the prompt seizure of property when required by reasons of public policy, when the rightfulness of such seizure can be afterwards investigated, and if wrongfully taken the article can be recovered or damages therefor, and the taking of human life which cannot be restored.

In the exercise of the police power, the General Assembly is not restricted to indictment, but may proceed by the summary process of abatement of the nuisance and imposing as a penalty the forfeiture or destruction (as it may deem best) of the article illegally used. An act of the Legislature, which speaks for the people in making its laws, is "the law of the land" unless there is a provision of the Constitution which forbids it to enact such law. We look in vain in that instrument for any provision which forbids legislation in furtherance of the police power, authorizing summary process of seizure of nets and their forfeiture when used in open violation of law. The right of seizure and destruction of the nets is not seriously denied. For a stronger reason then the alleged violator of the law cannot complain of the "sale at public auction" as that presupposes advertisement and delay, during which time, he can (as was done in this case) bring claim and delivery and recover the nets, if not used illegally.

whereas if summarily destroyed, his sole remedy is an action for damages. He is in better case than if the nets were destroyed. In either event, if he is proven to have used the nets illegally, he loses the nets, and it can make no difference to him whether they are destroyed or sold. The State is not compelled to commit an act of vandalism to be constitutional. It has found the criminal law an inefficient protection and that deprivation of the nets is necessary to prevent the violation of the law. The owner of the nets has his day in court to contest the fact of violation, by an action for damages if nets are summarily destroyed, and the additional remedy of claim and delivery if to be sold at public auction. He has nothing to complain of.

Our steady increase in population renders imperatively necessary the strict enforcement of all measures intended to protect or prevent interference with the sources of food supply for our people. The sovereign people of the State are in a bad case if they cannot protect the great fishing industry by providing that those who would destroy it by nets set at forbidden and vital places, during the four months prescribed, shall forfeit their nets. The General Assembly has found, and so says by its statute, that this remedy is necessary to enforce the execution of the law. Unless this is done the State is in fact utterly powerless to protect that large part of its people who are engaged in or dependent upon the great fish industry in its sounds and along its rivers, and the lawless element who disregard the law forbidding setting of nets, is exempt from control. The Constitution not having forbidden the Legislature to provide for the destruction or forfeiture and sale (as it may deem best) of nets illegally used, and the owner of the nets having his day in court, either by an action of damages or claim and delivery, this court has no supervisory power to hold that either the destruction of the nets or their forfeiture and sale is the remedy which the Legislature must provide. That is a matter for its judgment. It may prescribe either remedy or both, and change it by sub-

sequent enactment. The owner, if violating the law, has suffered a just punishment. If not violating it, he has his full remedy in court to recover the nets or damages as he may elect.

In the same way the State takes property under the right of eminent domain and turns it over to a railroad corporation which pays for it afterwards. And this is for the same reason that if litigation must be had and terminated before the taking, it would seriously impair the benefit intended by the exercise of the powers of the State for "the greatest good to the greatest number." For the same reason the United States statutes for the enforcement of the Internal Revenues, secs. 3455, 3457, forfeit articles not lawfully stamped, or stills, etc., illegally used, direct them to be sold and the proceeds paid into the Federal treasury, unless before sale the owner shall proceed, as here, by action to recover the articles on the allegation that there was no illegal user.

There are other United States and State statutes imposing forfeitures. Section 3460, U. S. Rev. Stat., provides that where the value of the property seized is less than five hundred dollars, the property shall be advertised and sold, and the proceeds paid into the treasury, unless the owner (as in this case) comes in and by action asserts his rights. *Conway v. Stannard,* 84 U. S., 404; *Pilcher v. Faircloth,* 135 Ala., 314. Where the amount is over $500, the government after seizure begins regular condemnation proceedings (21 Am. & Eng. Enc., (2nd Ed.), 931, note 12), but the authorities all hold that this is only necessary because the statute requires it, and that when the condemnation is decreed, it relates back to the date of the offense, (*The Mary Celeste,* 2 Lowell, 354; *Henderson's case,* 81 U. S., 44; *N. C. v. Vanderford, supra,*) as the forfeiture accrued then and the title passed to the government at that instant.

Such laws are not to be construed strictly, but reasonably, so as to carry out the intention of the Legislature. *U. S.*

v. Stowell, 133 U. S., 12. As is pointed out in *U. S. v. 56 Bbls. of Whiskey,* 25 Fed. Cases, 1075 (No. 15,095), there is a clear distinction between forfeiture of goods at common law in cases of treason and felony, which could take place only after conviction, and a statutory forfeiture of property because of its use for illegal purposes. In the latter case the offender is not on trial, nor before the court, unless he voluntarily comes in as a plaintiff to recover the goods. The statute, says the court, does not make the forfeiture the consequence of his conviction, but of his offense, which is inquired into by a seizure of the property while being illegally used, and proceedings of condemnation if required by statute, and if not, then by its destruction or sale unless the owner seeks an inquiry by claim and delivery or action for damages.

As was well said in *Weimer v. Bunbury,* 30 Mich., 211, there is nothing in the Constitution "that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." Then, after instancing the arrest of a felon, *flagrante delicto,* without warrant, 4 Blk. Com., 292, and a traveler passing over the adjacent field when a public road becomes impassable, it is further said: "Our laws for the exercise of the right of eminent domain protect parties in going upon private grounds for the preliminary examinations and surveys. It may be said that in none of these cases is the deprivation final or permanent, but that is immaterial. The Constitution is as clearly violated when the citizen is unlawfully deprived of his liberty or property for a single hour, as when it is taken away altogether. Estrays were at the common law taken up and disposed of without judicial pro-

ceedings, 1 Blk. Com., 297." Then after mentioning statutes to the same effect by which "the owner of stray beasts might be deprived of his ownership by *ex parte* proceedings not of a judicial character," and the abatement of nuisances by any one injured, who thus becomes "his own avenger or ministers redress to himself, 3 Blk. Com., 5," and distress without a warrant, 3 Blk. Com., 6, and levy and sale for taxes without judicial decree, it is said that the destruction of a nuisance by a private party "is as lawful as if it had been preceded by a judgment of a competent court, the only difference being that the party, when called upon to justify the act, must in the one case prove the facts warranting it, while in the other he would be protected by the judgment." This applies in the present case where the violator of the law is deprived of his net, *flagrante delicto*, but has his remedy, in this action against the officer for the property, if unlawfully taken.

The Supreme Court of the United States, 12 U. S. (8 Cranch), 404, says in this connection: "In the eternal struggle that exists between the avarice, enterprise and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the Legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offense, the seizure or the condemnation. In this instance, we think that the commission of the offense makes the point of time on which the statutory transfer of right takes place."

No Error.

HOKE, J., concurring: I concur in the decision of this case and am of opinion that the act in question is a constitutional exercise of legislative power. It is conceded that fishing in the waters of our sounds is the subject of legislative

regulation, that the Legislature may prescribe the time and method of taking fish, establish closed seasons, prohibit the placing of nets and traps within certain localities, declare such placing a criminal nuisance and direct its summary abatement. When such legislation, however, involves the destruction of private property, it must be limited to the reasonable necessities of the case which calls it forth, and may under given circumstances become the subject of judicial scrutiny and control.

The extreme necessity for this legislation and its beneficent purpose have been clearly and forcibly stated in the principal opinion, and the act, after making the placing of nets in prohibited territory a criminal nuisance, proceeds to direct a sale and forfeiture of the nets when placed in violation of its provisions. This last feature of the act in question is not usually or properly considered a part of the punishment, but as done in abatement of the nuisance, and, unless clearly unreasonable or utterly foreign to the purpose designed, will be upheld by the courts.

Mr. Bishop in his new work on Criminal Law, vol. 1, says of such forfeitures: "Destruction by abatement is a phrase denoting one form of the transmutation to be brought to view in this chapter. It occurs when one permits a thing to become a nuisance which another abates without appeal to the courts * * * If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated to the destruction, if necessary, of the property * * * Abatable nuisances afford a further illustration. Whenever the subject of property, whether through its owner's fault or not, is in a situation to be a nuisance, it is not strictly forfeited, but the nuisance may be abated to the destruction, if necessary, of the property. Even where a nuisance is created by the commission of a crime, its abatement without judicial proceedings is not punishment, which can follow only the conviction of an offender. On such conviction, the court perhaps usu-

ally, not always, orders the abatement, yet even this is not properly a part of the punishment * * *" Again, to meet a *dictum* that such forfeitures were violations of constitutional guaranties,—for trial by jury, and that no one should be deprived of his property but by the law of the land,—he says: "The better view is pretty plainly antagonistic to this *dictum*. It is competent, on general principles, for the law-making power to declare what shall be a public nuisance and to provide for the forfeiture of the thing which shall become such. The forfeiture may be as well without judicial proceedings as with, and the case is entirely outside such constitutional provisions as those referred to by the learned judge * * * In principle and in conclusion, we appear to have something like the following: Whenever the law, statutory or common, creates a forfeiture of property by reason of particular circumstances attending it, or of its being dangerous to the community, or of any form or position which it assumes, this forfeiture is not to be deemed a punishment inflicted on its owner in the criminal law sense. It is not therefore within constitutional guaranties protecting persons accused of crime." This author further says: "There is a difference between what is on its face a nuisance or otherwise dangerous, therefore to be at sight and *in pais* forfeited or abated like a dog or hog wrongly at large, or a thing laid to obstruct a public way, and an article not in itself harmful, yet made so by the evil purpose of its owner. In this latter case, the owner should have notice," etc. The case before us is declared a nuisance by reason of its placing regardless of the intent of the owner, and may be likened to the instance given of the physical obstruction of a highway.

I believe in case of a hog running at large in violation of an ordinance, our own courts have held that some kind of notice or opportunity to redeem should be given. This, however, can be easily distinguished on the ground that the forfeiture of the hog is clearly not necessary to the purpose of

the ordinance; and this I apprehend is the true principle on which forfeitures of this character can be sustained, whether it is done in abatement of the nuisance and is required by the reasonable necessity of the case.

After much reflection I have come to the conclusion that the act in question is neither unreasonable nor oppressive, and may well be upheld as a lawful and proper forfeiture of the offending property. This is by no means because of the small value of the property seized, but rather because of the vast extent and importance of the industry involved, the large number of people affected, the great difficulty of affording protection by reason of the exposed nature of the place, the impossibility of keeping effective watch, and the ease with which such property can be withdrawn, concealed or replaced by offenders in the prohibited ground. Under all the facts and circumstances of this case, the court would not be justified in declaring that the forfeiture directed in the effort to abate this nuisance is unreasonable and in excess of legislative power.

In some of the decisions it is suggested that the same constitutional provisions, which guarantee the enjoyment of a citizen's property, protect also his life and liberty, and if property can be lawfully forfeited or destroyed by legislative or executive action, the life and liberty of the citizen can be dealt with in like manner. But not so. Such legislation affecting life or liberty would be so clearly excessive and so entirely foreign to the object and purpose of abating a nuisance, that it would at once become the proper occasion for judicial interference. It cannot be likened to the forfeiture of offending property seized "in *flagrante delicto*" and directed in the necessary and reasonable effort to abate a criminal nuisance. The suggestion, I respectfully submit, affords no aid to the proper construction of the statute before us. I concur in the decision of the court.

CONNOR, J., dissenting: It is conceded that no person has a several right of fishery in the public navigable waters of the State. *Collins v. Benbury*, 25 N. C., 277; *Skinner v. Hettrick*, 73 N. C., 53. The Legislature has the right to prescribe regulations regarding the time, manner and means of fishing, etc., in such waters, including the power to prohibit the placing of nets, traps, etc., in such portion thereof as it may deem proper for the protection of the rights of the public; it may declare such nets, etc., as are prohibited, or all nets at certain places or fixed periods, public nuisances, and provide for the summary abatement, by removal thereof. *Hettrick v. Page*, 82 N. C., 63. It is needless to discuss the limitations upon this power because the plaintiff does not question the validity of those provisions of the statute by which it is asserted. I fully concur in the opinion of the Chief Justice in this respect. I also concur in his approval of the policy upon which the statute is based and the end sought to be attained. I dissent from the conclusion that section 9, conferring upon the Oyster Commissioner the power to seize the nets and sell the same at public auction without notice to the owner, either personal or constructive, or any judgment of condemnation by any judicial tribunal after a hearing or any opportunity to the owner to be heard, and the disposition of the proceeds as directed, is valid. The right to pass acts of this character is derived from the police power, which is an essential attribute of all government. Without undertaking to define this somewhat elastic term or fix its somewhat elusive limits, it is sufficient, for the purpose of this discussion, to say that it must be exercised within, and subject to, the constitutional limitations by which the life, liberty and property of the citizen is secured. In a government deriving its powers from the consent of the governed, moving within and bounded by the clearly expressed grants of a written constitution, no germ of arbitrary power is to be found or can have any existence. Each department

of the government must find its power to act in the charter by which it is created and by which all powers, not delegated, are reserved to the people. The argument that the act is valid because no provision is found in the Constitution prohibiting its passage is, I submit with great deference, but equal confidence, based upon a misconception of the nature of our government and the fundamental principle upon which it is founded. *Reade, J.*, in *Nichols v. McKee*, 68 N. C., 430, says: "The theory of our State government is that all political power is vested in and derived from the people. The Constitution is their grant of powers and it is the only grant which they have made. 'And all powers not therein delegated remain with the people.' Article 1, section 37. This last clause will not be found in the former constitution of the State * * * It follows that it is not true, as contended for upon the argument, that the Legislature is supreme except in so far as it is expressly restrained. However that may be in other governments, or however it may have heretofore been in this State, it is plain that since the adoption of our present Constitution the Legislature, just like each of the other departments, acts under a *grant* of powers and cannot exceed them." While the *legislative* authority is vested in the General Assembly, no *judicial* power is there granted. On the contrary, it is expressly prohibited to that department and vested in the judicial department. This is fundamental and never for a moment or upon any consideration to be lost sight of. Among the clearly expressed limitations upon each department of the government we find it declared: "That no person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or property but by the law of the land." Const., Art. I., section 17. These words, in substance, come to us from Magna Charta; of them Blackstone says: "They protected every individual in the nation in the full enjoyment of his

life, his liberty and his property, unless declared forfeited by the judgment of his peers or the law of the land." Com., vol. IV., page 24. Creasy says: "The ultimate effect of this chapter was to give and to guarantee full protection for person and property to every human being that breathes English air." Eng. Const., 151.

The latest commentator on Magna Charta says: "Three aspects of this prohibition may be emphasized: "(1). Judgment must precede execution," etc. McKechnie, Magna Charta, 438. Many definitions of the term "law of the land" have been formulated. *Judge Cooley* is of the opinion that none are more accurate or more often quoted than that of Mr. Webster in his great argument in the *Dartmouth College case*. "By the law of the land is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry and reaches judgment only after trial." This court has adopted, with approval, this definition. *Parish v. Cedar Co.*, 133 N. C., 478. *Mr. Justice Douglas* in that case notes that Mr. Webster in enumerating legislative acts which fall within the condemnation of this provision, includes "acts of confiscation" and "legislative forfeitures" among the intolerable evils to be avoided. The term has been construed to be synonymous with "due process of law," of which it is said "the essential elements are notice and opportunity to defend." *Simon v. Craft*, 182 U. S., 427. While conceding these elementary principles, there appears to have been made, upon some minds, an impression that in the exercise of the police power, especially when applied to the abatement of nuisances, the Legislature is not to be controlled by them. They appear to hold that in respect to this essential and yet easily abused power, the public welfare is paramount, to the security of the citizen, which must be sacrificed upon the slightest suggestion that the public welfare demands it. It is undoubtedly true that the public welfare or "the good of the whole" is paramount, but experience has

brought men to see the truth that the public welfare is preserved only when limitations are placed upon the government and those who make, declare and execute the law. The public welfare demands the punishment of crime as a means of prevention, but the same public welfare demands that trial by due process of law and conviction shall precede punishment. When such limitations are not imposed it is found that "the grim tradition" is true.

> "I oft have heard of Lydford law,
> How in the morn they hang and draw,
> And sit in judgment after."

I cannot assent to the validity of any legislative enactment depriving the citizen of his life, liberty or property, which will not stand the test of the standard fixed by the Constitution. Discussing the limitations upon the police power, the author of the latest work on the subject says: "There has never been a civilized government which has not recognized and practically acted upon the existence of limitations of the nature here indicated. For all governments profess to apply or make law, and the nature of law implies the idea of restraint according to intelligible principles of reason. The peculiarity of American jurisprudence and government lies in the possibility of subjecting legislation to judicial control with a view of enforcing these principles and limitations." Freund on Police Power, page 15.

It will be observed that the value of the plaintiff's net is $60. It is a matter of which we may take notice that a large number of the people in the section of the State in which the plaintiff lives are dependent upon fishing for the support of themselves and their families. There is no suggestion that the net is, in its construction or use, otherwise than is prohibited by the statute, vicious or unlawful. It is difficult to see in what respect it is more offensive to the law or injurious to the public welfare than the mule of a farmer which is tied

to a shade tree, or driven in a manner or at a speed prohibited by some town ordinance. While in such case the owner should not use his property in a manner prohibited by law, it is equally true that he should not, for doing so, be deprived of it otherwise than by the law of the land. The power of the Legislature to prescribe regulations for the use of the public waters is in no respect different from its power to regulate the use of the public highway. The power in both cases comes from the same source and is subject to the same limitations. I would deem it sufficient to state the proposition and be content to rest my opinion in respect to its validity, but for the fact that a majority of my learned associates differ from me. A respectful regard for their opinion, expressed with his usual clearness and force by the Chief Justice, imposes upon me the duty of examining the reasons upon which the conclusion is based and the authorities cited to sustain them. I prefer to rest my opinion upon the provisions of the State Constitution rather than the Fourteenth Amendment. As early as 1787, and among the earliest opinions ever filed by our judges, it was held in *Bayard v. Singleton*, 1 N. C., 5, "That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial jury. For that if the Legislature could take away this right and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without the formality of any trial at all." In *Hamilton v. Adams*, 6 N. C., 161, *Hall, J.*, says: "It is a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the Constitution. Hence it is that no court will give judgment against any person unless such person have opportunity of showing cause against it. A judgment entered up otherwise would be a nullity."

Daniel, J., in *Robinson v. Barfield*, 6 N. C., 391 (420),

says: "The transfer of property to one individual, who is the owner, to another individual, is a *judicial* and not a *legislative* act. When the Legislature presumes to touch *private property* for any other than public purposes, and then only in case of necessity and rendering full compensation, it will behoove the judiciary to check its eccentric course by refusing to give any effect to such acts * * * Our oath forbids us to execute them as they infringe the principles of the Constitution."

Ruffin, C. J., in *Hoke v. Henderson,* 15 N. C., 1, said: "But to inflict punishments after finding the default, is to adjudge; and to do it *without default* is equally so, and still more indefensible. The Legislature cannot act in that character, and therefore, although this act has the *forms* of law, it is not one of those *laws of the land* by which alone a freeman can be deprived of his property. Those terms "law of the land," do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated * * * In reference to the infliction of punishments and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other State of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or *to deprive* the citizen *of his property,* without trial before the judicial tribunals, and a decision of the matter of right, as determined by the laws under which it is vested, according to the course made and usages of the common law as derived from our forefathers are not effectually "laws of the land" for those purposes.

While the opinions filed do not seriously controvert these elementary principles, they hold that the plaintiff has no right to invoke them in this case and can claim no protection by virtue of them. That as to him they are pure abstractions,

for that he and his nets are outlawed by legislative enactment. This holding is based upon the following propositions:

1. That the Legislature in the exercise of the police power may authorize the summary abatement of a public nuisance, and, if necessary to that end, direct the destruction of the offending property.

2. That the right to destroy includes the right to condemn and sell by summary action, without notice, or judgment of forfeiture and condemnation.

3. That such summary forfeiture and condemnation may be enforced by a ministerial officer, because it is directed to and operates upon the property and not as a punishment or penalty imposed upon the owner for violating the law.

4. That if the owner is entitled to a hearing and judicial determination of his rights, he may obtain it by resorting to the courts in any appropriate action, and that he is not entitled to demand that due process be provided in the statute.

I propose to discuss these propositions in the order in which they are stated. Before proceeding to do so, it will be well to state some elementary principles which always control courts in passing upon the constitutionality of statutes. "We can declare an act of the Assembly void when it violates the Constitution clearly, palpably and plainly and in such manner as to leave no doubt or hesitation on our minds." *Sharpless v. Mayor*, 21 Pa. St., 147. "The words of the Constitution furnish the only test to determine the validity of the statute and all arguments based on general principles outside the Constitution must be addressed to the people and not to us." *Ibid.* While courts may not declare an act void because in their opinions it is unwise, so, on the contrary, they may not strain the words of the grant to sustain an act because they deem it wise. While we are to keep a watchful eye, clear mind and firm hand upon every threatened invasion of the constitutional guaranties of the citizen,

we are to accord to the several departments of the government, and those who may administer to them, the same jealous regard in that respect which we ourselves exercise. *State v. Barrett,* 128 N. C., 630. When an unusual or extraordinary power is asserted by the government, or unusual and extraordinary method, contrary to the procedure and course of the common law, is prescribed by which the right of the citizen, either in respect to his person or property, is invaded, every reasonable doubt must be construed against the asserted power and mode of procedure and in favor of the right of the citizen to demand that he be tried by due course of law. As in England, all language in grants are to be construed most strongly in favor of the King, so in North Carolina all such language must be construed most strongly in favor of the people—the sovereigns. With these rules for guidance, I proceed to discuss the propositions and ascertain how far they may be sustained and applied to the facts in this record.

The right to abate a private nuisance, or a public nuisance, when specially injurious to a private person is of course conceded. The extent to which a person may go in doing so, is fixed by the necessity of the occasion, taking into consideration the character of the nuisance, the means by which it is created or maintained, the imminence of the danger, the character and extent of the injury, etc. This right a person has in a state of nature, entirely independent of municipal law, and when he enters into the social or political state, this right is not surrendered but recognized and regulated by the principles of the common law. The Legislature may, upon the same principle, authorize ministerial officers to abate public nuisances and may authorize the destruction of the offending property when necessary for the public welfare or safety. The power is based upon the same reason and controlled by the same limitations—necessity. It is difficult and not necessary in this discussion to define or attempt to mark the limits of this power. It is sufficient to say that it is not

arbitrary, but is within judicial control. The latest work on the police power thus states the law: "When the condition of a thing is such that it is imminently dangerous to the safety, or offensive to the morals of the community, and is incapable of being put to any lawful use by the owner, it may be treated as a nuisance *per se*. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued. Rotten or decayed food or meat, infected bedding or clothing, mad dogs, animals affected with contagious diseases, obscene publications, counterfeit coin and imminently dangerous structures are the most conspicuous instances of nuisances *per se*." Freund on Police Power, sec. 520. There are many cases in our reports, restricting this power, not necessary to be noticed here for the double reason that the statute under discussion does not direct the destruction of the nets—nor does it declare them to be public nuisances either *per se* or when used in violation of its provisions. There is not the slightest suggestion that the nets are, either of themselves, or when put into the prohibited waters, public nuisances. I attach no great importance to this fact, except to show, as I shall undertake to do, that in the cases relied upon to sustain the opinion of the court, the property was, by its illegal use, declared by the statute to be a public nuisance.

The right to direct the removal of nets used in violation of law is sustained in *Hettrick v. Page*, 82 N. C., 65, in which *Smith, C. J.*, says that no unnecessary damages must be done to the property removed. *Rea v. Hampton*, 101 N. C., 51. No case can be found in our reports authorizing the destruction of nets. I might safely concede the right of the Legislature to direct their destruction by way of abating the nuisance, but I do not find any evidence in the record that such destruction was reasonably necessary. It is claimed that the right to destroy has been settled by the courts and from this right the power to sell without due process of law is said to

follow. In *Weller v. Snover,* 42 N. J. L., 341, it was held that a statute authorizing the destruction of a fish-basket placed in a stream prohibited by law was valid. In the statute it was expressly required that the fish warden shall first give notice in two newspapers, and the owner is given ten days within which to remove the baskets which are declared to be common nuisances. In *Am. Print Works v. Lawrence,* 21 N. J., 248, cited in the opinion, no question of police power or of nuisance was involved or passed upon. The plaintiff sued the defendant, Mayor of New York, charging that he caused its storehouse and the goods therein to be blown up with gun powder and destroyed. The defendant justified by alleging that a fire was raging and it became necessary to destroy plaintiff's property to prevent its spreading, etc. The court, after defining the right of eminent domain, said: "But the right to destroy property to prevent the spread of a conflagration, rests upon other and very different grounds. It appertains to individuals, not to the State. It has no necessary connection with or dependence upon the sovereign power. It is a natural right existing independent of civil government." The weight to be given this case as an authority is lessened by the fact that the decision was reversed by the court of Errors and Appeals, 21 N. J., 714. There were several cases growing out of a disastrous fire in New York. It will be found that the judgment of reversal was in *Hale v. Lawrence,* See Rep., note page 716. Without going into the facts and the able discussion of the law by the court upon the very interesting question presented, it is sufficient to say that the case does not involve or decide the principles presented in our case. In *Bittenhaus v. Johnson* (Wis.), 32 L. R. A., 380, the statute declared the nets in prohibited waters a public nuisance and directed their destruction. The act was upheld, relying upon *Lawton v. Steele,* which will be noticed later. *Burroughs v. Eastman,* 101 Mich., 428, was an action for an assault committed in the

arrest of the plaintiff and has no bearing upon this case. The cases cited, with the exception of *Lawton v. Steele,* 119 N. Y., 226, are the only ones in which the right to destroy fish nets has been sustained. In that case nets found in the public waters are declared to be public nuisances, and their destruction authorized. *Andrews, J.*, says: "We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of the nets so placed is a reasonable incident of the power of the abatement of the nuisance. The owner of the nets is deprived of his property * * * as incident to the abatement of the nuisance * * * But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton or unnecessary injury must be committed. 3 Bl. Com., 6. It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the Legislature could adjudge their destruction as a reasonable means of abating the nuisance." There is here a clear recognition of the only principle upon which the right can be sustained *necessity incident to the abatement of the nuisance.* This case was carried by writ of error, to the Supreme Court of the United States, and is reported in vol. 152, U. S. R., 133. It is claimed that the question raised by the plaintiff is settled by that decision. It is also said that plaintiff's contention is based upon the Fourteenth Amendment, and that the construction put upon its language by the Supreme Court of the United States, controls this court. If the premise be correct, I admit the conclusion. I am at a loss to see why it is necessary for a citizen of this State to resort to the Federal Constitution to protect him in the right to demand that his property be taken from him only by the law of the land or due process of law. I am not willing to make such concession. This right is

guaranteed him as a citizen of the State, and it is in respect to his status as such and right secured to him by the Constitution of the State that he prosecutes this action. Certainly any decision of the Supreme Court of the United States construing language found in both the State and Federal Constitutions, is entitled to the most weighty consideration. The Supreme Court of Ohio, in *Edson v. Crangle,* did not hesitate to follow its own conclusion upon this identical question, although *Lawton v. Steele* was pressed upon their attention. The value, therefore, of that case as an authority is dependent upon the reasoning of the opinion and the unanimity of the judges. After laying down the general principles applying to such cases, the court proceeds to say that many articles, such as dice, cards and other articles used for gambling purposes, may become nuisances by being put to illegal purposes, concluding: "It is true that this rule does not always follow from the illegal use of a harmless article." After further discussion it is said: "It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value." A careful reading of the opinion impresses my mind with the conviction that the decision is to a very large extent based upon the last suggestion—the value of the property. The nets were worth $15 each. The Chief Justice wrote a strong dissenting opinion in which Justices Brewer and Field concurred. He said: "Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the Legislature of a State, the power to declare them public nuisances, even when put to a use in a manner forbidden by the statute, and on that ground to justify their abatement by seizure and destruction without process, notice or the observance of any judicial form * * * It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing

nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value, ordinarily affect the principle or tend to show their summary destruction to be reasonably essential to the suppression of their illegal use. Indeed I think the argument is to be depreciated as weakening the importance of the preservation, without impairment, in ever so slight a degree, of constitutional guaranties." Mr. Freund well says: "The principles which govern the forfeiture of property were departed from in the decision of the New York Court of Appeals, and the Supreme Court of the United States in the case of *Lawton v. Steele* * * * The chief argument relied upon was the trifling value of the property taken and the disproportionate cost of condemnation proceeding, is an inadmissible argument when constitutional rights are involved." Without conceding that the value of the property should be considered in the decision of the case, I should not hesitate to say that if considered, it would not weigh against the plaintiff. To a fisherman on our coast, a net worth sixty dollars is not of so inconsiderable value that a court should dismiss his controversy as beneath its dignity. We know from observation that thousands of our people are dependent upon the use of property of no more value for their support—the value of the average mule is but little, if any larger, and the tools and implements of many mechanics with which they earn the support of their families, is much below sixty dollars. It is proper to say that no such suggestion found any favor with any member of this court. I notice it only because I concur with Mr. Freund that it was the "chief argument relied upon" and with the Chief Justice that it weakens the preservation of constitutional guaranties. In a very able brief

filed in *Edson v. Crangle, supra,* the decision is referred to as "remarkable" and as "absolutely inconsistent with earlier decisions rendered by former judges of that court." When I say that neither the reasoning nor the authorities cited in this case are convincing to my mind, I am sustained by the strongly expressed dissent of the Chief Justice and two of his associates. The right to abate nuisances, by summary destruction of the offending property, is founded upon necessity, and is confined either to those things which are nuisances *per se,* or in the continued existence of which the danger to the public is imminent, or which endangers public morals and is limited, as said by Chief Justice Fuller, "to the necessity of the occasion." When destroyed pursuant to law, it is an assertion and exercise by the State of a right which the citizen has by the law of self protection. The language quoted by *Mr. Justice Hoke* from Bishop, 1 Crim. Law, applies solely to abatement by destruction. He says: "If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated to the destruction, if necessary, of the property." This is consonant with the authorities. There is not a word or suggestion to be found in the statute tending to show that, in the opinion of the Legislature, destruction of the nets was necessary as an incident to the abatement of a nuisance. The contrary is manifest from the direction to the officer to sell them. This removes them far beyond the domain upon which, alone, their destruction could be justified. Certainly if I am correct in saying that they may not be destroyed, it will be conceded that there is no possible justification for selling them without due process of law. I earnestly contend that if they come within the power of the officer to destroy, it would not follow that they could be sold as directed by the statute.

I will discuss the second and third propositions together. The right to declare the property used in violation of law forfeited, and to sell the same, is based upon an entirely

different principle from the right to destroy. Mr. Freund says: "The power of summary abatement does not extend to property in itself harmless, but which is put to unlawful use or is otherwise kept in a condition contrary to law * * * The unlawful use may, however, be punished and the punishment may include a forfeiture of the property used to commit the unlawful act. While in many cases this would be an extreme measure, it is subject to no express constitutional restraint, except where the Constitution provides that every penalty must be proportionate to the offense * * * Such forfeiture is not an exercise of the police power but of the judicial power, i. e., the taking of the property does not strictly subserve the public welfare, but is intended as a punishment for an unlawful act. Hence, forfeiture requires judicial proceedings, either personal notice to the owner or at least a proceeding *in rem* with notice by publication. Secs. 525-526. Mr. Tiederman (State & Fed. Con., 825,) says that forfeiture may be declared "as a penalty for the infraction of the law * * * But in all of these cases, the seizure and the destruction must rest upon a judgment of forfeiture procured at the close of the ordinary trial in which the owner of the property has had full opportunity to be heard in defense of his property." In *Colon v. Lisk*, 153 N. Y., 188 (60 Am. St. Rep., 609), discussing a statute having a provision somewhat similar to ours, the court said: "That the forfeiture used in violation of this statute, is in effect a penalty, we have no doubt." The power to declare a forfeiture and sell property used in violation of a statute, without notice or an opportunity to be heard or judgment of condemnation was denied by this court as early as 1816.

In *Shaw v. Kennedy*, 4 N. C., 591, an ordinance of the town of Fayetteville authorizing the town constable to "take up and sell all hogs found running at large in any of the streets of the town and paying one-half of the proceeds to the town treasurer and the other half to apply to his own use" was

held unconstitutional. The court, by *Seawell, J.*, said: "The law of the land * * * allows to every person the opportunity of defending his property before it is condemned; and in no case leaves it to the mercy of a mere ministerial officer to seize it at will; which seizure is to be lawful or not, according to his own will and pleasure. The ordinance was therefore, on that account, unauthorized and consequently void." That was an action of trespass against the town constable for taking up the plaintiff's hogs. Judgment was for the plaintiff, although it appeared that the hogs were running at large in violation of the ordinance.

In *Hellen v. Noe*, 25 N. C., 493, the case is cited, approved and distinguished, *Daniel J.*, saying: "But in this case the ordinance does not attempt to deprive the owner of his property; provides for his having notice, and secures to him every right which he can claim, not inconsistent with the object of the ordinance, the prevention of mischief to the community." In that case the officer was required to give public notice and the owner was entitled to come forward and take his property and pay the officer's charges only, or if a sale took place the purchase money, after deducting the costs, was to be held for the owner. The same ordinance was before the court in *Whitfield v. Longest*, 28 N. C., 268, the only question then decided being that it applied to non-resident owners of hogs. In *Rose v. Hardie*, 98 N. C., 44, cited by the court, the ordinance required notice to be given by the constable "at the court house door, in the best manner he can," giving the ear marks, or other distinguishing marks, and if the owner called for the same within three days, prove his or her property, pay for each hog or goat the sum of one dollar as a penalty for suffering it to run at large, and also fifty cents for the marshal's fee for impounding, and ten cents a day for keeping, he shall have his property, etc. In *Broadfoot v. Fayetteville*, 121 N. C., 421, the same ordinance was before the court upon the question of its application to non-resident

owners. Sections 2811, 2815, 2817, of The Code provide that where the stock law prevails, it shall be unlawful for any person to permit any live stock to run at large. That any person may take up and impound any live stock running at large, etc., and demand the amount fixed by the statute for impounding and keeping such stock. Before any sales shall be made, if the owner of said stock be known to such impounder, he shall immediately inform such owner where his stock is impounded and he shall have two days within which to redeem his property and upon failure to do so, such impounder shall give twenty days' notice of sale and shall from the proceeds pay the expenses and the balance he shall turn over to the owner, if known, and if not known to the school fund, in which case the owner shall have six months within which to call for the money.

With a single exception, I have been unable to find any statute in our Code which confers the power upon a ministerial officer to destroy the property of the citizen without due process. Section 1049-1050. Section 2500 of The Code, authorizing the killing of dogs that kill sheep, provides that the owner shall have notice and satisfactory evidence of the charge be produced before a justice of the peace. It is true that statutes and town ordinances have been sustained, empowering the destruction of dogs without a collar, and upon which the tax has not been paid. These cases are put upon the ground that they are a menace to the public safety. Some of the judges have also sustained the power because they were not property. The tax imposed is not a property tax, but a license for the privilege of keeping them. *Sentell v. N. O. R. R.*, 166 U. S., 698; *Mowery v. Salisbury*, 82 N. C., 175. We held in *Parish v. Cedar Co.*, 133 N. C., 478, that an act which provided that when the owner of swamp land failed to pay the taxes assessed thereon such land should be forfeited to and vested in the State without any judicial proceeding, was unconstitutional. *Mr. Justice Douglas* said that

the decision was based exclusively upon the provisions of the State constitution. Bill of Rights, section 17. This case was approved in *Lumber Co. v. Lumber Co.*, 135 N. C., 742. I am at a loss to see how the decision of this case can be reconciled with *Shaw v. Kennedy, supra.* An exhaustive examination of the decisions of other courts fails to disclose a single case in which the power of the Legislature to declare a forfeiture and direct a sale of property without due process is sustained. On the contrary, the decisions are uniform in the denial of any such right or power. Time and space permit the notice of only a few of the many cases in which the power is denied. In *Ieck v. Anderson,* 57 Cal., 251, *McKee, J.,* said: "But the statute under consideration contained no provision whatever for determining whether the property was liable to condemnation for the forfeiture denounced against it for the criminal acts of those who had it in their possession. It merely authorized a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county for five days. Such an enactment cannot be harmonized with those constitutional guaranties which are supposed to secure every one within the State in his rights of liberty and property." After citing authorities, he concludes: "It follows that so much of the statute under consideration as authorized defendant to arbitrarily seize and destroy or sell the property of the plaintiff for alleged forfeiture, without judicial proceeding for its condemnation or monition or notice actual or constructive to its owner * * * was unconstitutional and void." *State v. Robbins,* 124 Ind., 308. In *Edson v. Crangle,* 62 Ohio St., 49, a statute prohibiting the placing of nets in certain public waters was under discussion. In regard to a section substantially like section 9 of our act, *Burkett, J.,* for the court, said: "While the seizure may be made in the first instance by

an officer of the law doing no unnecessary damage, the confiscation must be made by the judgment of a court having jurisdiction of the subject matter. This section gives the right of confiscation, but fails to provide a legal proceeding by which the confiscation may be adjudged, and there being no other statute providing in like cases, it attempts to take and sell private property and place the proceeds in the public treasury without any process of law." The statute was held unconstitutional, the opinion concluding, "Proper legal proceedings are always necessary to adjudge a forfeiture or confiscation and to permit officers to seize, sell and appropriate private property without legal proceedings under a claim of confiscation, would be inconsistent with the principles of constitutional government and would soon lead to fraud, corruption, oppression and extortion." This case is strikingly like the one before us. The action was by the owner for the possession of his net detained by the officer. The court held that he was entitled to recover. The case was argued upon full briefs by the Attorney-General and other eminent counsel. The Supreme Court of Maine, in *Dunn v. Burleigh*, 62 Me., 24, in passing upon a statute prohibiting trespassing upon public lands and empowering a land agent to seize the team of the trespasser and sell the same by giving notice in newspapers, etc., said: "Will any one contend that it is competent for the Legislature to pass an act authorizing the land agent to seize the person of a trespasser upon the public lands and hang him, or imprison him for life without any other trial of his guilt than the *ex parte* determination of the land agent himself, and no other authority than his own personal command? Of course not. No more is it competent for the Legislature to pass an act authorizing the land agent to deprive a person of his property in such a summary mode; for what is due process of law in the one case must be equally so in the other. In the Constitution, life, liberty and property are all grouped together, and the same protection which is

secured to one is secured to all." *Lowry v. Rainwater*, 70 Mo., 152; *King v. Hayes*, 80 Me., 206. *Osborn v. Charlevoix*, 114 Mich., 655, cited in the opinion fully sustains my view and notes the very distinction for which I am contending. *Montgomery, J.*, on page 663, says: "It is clear that this act permits the seizure of nets and apparatus, but only when the same are found in actual use. It is also plain that the warden has no right to destroy the same until ordered by the court before whom the offense is tried, and by this we understand is meant the court before whom the person offending is tried for the unlawful use for which the apparatus is seized; and it is implied that the disposition of the property is to be determined in that proceeding to which the offender is a necessary party and in which he has a right to be heard." The entire opinion is based upon this distinction—the officer may seize and remove the net, but he cannot destroy or sell until some judicial proceeding is had or at least an opportunity be given the owner of the property to be heard. The question involved underwent an exhaustive examination by the Supreme Court of Massachusetts in *Fisher v. McGill*, 11 Gray (67 Mass.), 1, in which Rufus Choate, then Attorney-General, was of counsel, and *Chief Justice Shaw* wrote the opinion for a unanimous court of exceptional ability. Certainly from this source we may draw sound doctrine. The Legislature for the purpose of suppressing the liquor traffic enacted a statute, containing provisions similar, but not so barren of protection to the citizen as ours. The right to regulate or to prohibit the traffic was fully conceded. The only question involved was the mode of procedure, leading to condemnation of property. It is thus stated by the *Chief Justice*: "The question is whether the measures directed and authorized by the statute in question are so far inconsistent with the principles of justice and the established maxims of jurisprudence, intended for the security of public and private rights, and so repugnant to the provisions of the Dec-

laration of Rights and Constitution of the Commonwealth, that it was not within the power of the Legislature to give them the force of law and that they must therefore be held unconstitutional and void; and the court are all of the opinion that they are." After noting other objections to the statute he says: "Then the property may be confiscated and destroyed without any opportunity given the true owner to be heard. But suppose the officer happens to be right, and the owner has notice, the notice is to appear forthwith. No day in court is given, no allowance made for the contingency of the owner's absence or sickness or engagements * * * These measures seem wholly inconsistent with the right of defending one's property and of finding a safe remedy in the laws * * * Now, we can perceive no provision for the trial and proof of this offense of keeping liquors with illegal intent in any sense in which a judicial trial is understood, in which a party charged with an offense, for which his property may be taken from him and confiscated, may stand on his defense and have the presumption of innocence until proofs are adduced against him to establish the crime or misdemeanor, with which he is charged. Such a trial alone can satisfy the express provisions of the Declaration of Rights, which declares that no subject shall be * * * but by the judgment of his peers or the law of the land. These expressions have been understood from Magna Charta to the present time to mean a trial by jury in a regular course of legal and judicial proceeding."

In *Varden v. Mount*, 78 Ky., 86, an ordinance authorizing the marshal of a town to seize all hogs running at large and sell them was held void, for that no provision was made for giving notice to the owner, the court saying: "This is the general rule, and it is only in extreme cases, where the preservation and repose of society or the preservation of the property rights of a large class of the community absolutely require a departure that the courts recognize any exception.

The exception can only be sustained upon 'an overruling necessity.'" The same was held in *Donovan v. The Mayor,* etc., 29 Miss., 247.

In *Heis v. Town Council,* 6 Rich., 404, it is said: "A man's property cannot be seized except for violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine." In *Bradstreet v. Neptune Ins. Co.,* 3 Summer, 601, *Judge Story,* referring to a *proceeding in rem* in which no notice is given, says: "It amounts to little more in common sense and common honesty than the sentence of the tribunal, which first punishes and then hears the party."

In *Poppen v. Holmes,* 44 Ill., 360, the plaintiff's horse had been seized while running at large in the town in violation of the ordinance authorizing a sale by the pound master thereof, if the costs, etc., were not paid. Plaintiff brought replevin. Defendant justified under the ordinance. The ordinance was declared void because no provision was made for hearing. In *McConnell v. McKillip* (Neb.), 65 L. R. A., 610 (1904), the statute prohibited hunting or fishing without a permit, and declared that all guns, etc., in actual use by any person hunting or fishing without such permit should be forfeited to the State. The commissioner appointed to enforce the statute was authorized to seize and sell such gun, etc., and pay the proceeds into the school fund. The plaintiff being engaged in hunting without a license, his gun was seized by the officer. He brought an action to recover possession of his property, alleging that the statute in so far as it authorized the seizure and sale of his property without a hearing, was void. The court by an opinion concurred in unanimously, sustained his contention assigning the same grounds upon which this dissenting opinion is based—concluding: "There is a clear and marked distinction between that species of property which can only be used for an illegal purpose and which may therefore be declared a nuisance and

summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure if innocent in itself, its forfeiture and the transfer of the right of property in the same from one person to another as a punishment for crime without the right to a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect. If the property seized by a game keeper or warden were a public nuisance, such as provided for in section 1, he had the right under the duties of his office at common law to abate the same without judicial process or proceedings; and the great weight of authorities is to the effect that such common law rights have not been abrogated or set aside by the provisions of the Constitution; but if the property is of such a nature that though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the State as a penalty, no person has the right to deprive the owner of his property summarily without affording opportunity for a hearing and without due process of law. The usual course of proceeding in such case has been either as in admiralty or revenue proceedings to seize the property, libel the same in a court of competent jurisdiction and have it condemned by that court or as in criminal matters to arrest the offender and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed and to which the penalty attaches should take place. These have been the methods of procedure for centuries." This is the latest discussion and decision of the question involved. See also *Boggs v. Comm.*, 76 Va., 989; *Colon v. Lisk, supra.*

Walker, J., in *Dorman v. State*, 34 Ala., 116, said: "If life, liberty and property could be taken away by the direct operation of a statute, the enjoyment of these rights would depend upon the will and caprice of the Legislature and the

provision would be a mere nullity. Thus construed the Constitution would read 'no person shall be deprived of his life, liberty or property unless the Legislature pass a law to do so.'" The doctrine is well stated by *Judge Cooley* (Const. Lim., 7 Ed., 518): "Nor can a party by his conduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of right and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice, would be void as not being due process of law." The authorities in addition to those cited are uniform and abundant to sustain these propositions.

1. That the right to destroy property which is a public nuisance, either *per se,* or made so by statute, or becoming so by the manner of its use, is restricted to the necessity of the occasion, or as an incident to the abatement.

2. That the power to declare property forfeited and subject it to sale by reason of its illegal use, is *judicial* and not *legislative*. That it can only be exercised as a penalty or punishment imposed upon the owner for violating the law, and, as a necessary conclusion, the forfeiture and condemnation can only be declared and enforced after a hearing or an opportunity to the owner to be heard.

I have not found it possible, without further extending this opinion, already too long, to comment upon references in the opinion to Internal Revenue Laws. They are not at the best a favorite field for the investigator of authorities to sustain personal or property rights. From the third proposition asserted by the court, I dissent. It is said, Why permit the plaintiff to raise the question of the validity of the statute? He admits that he has violated its provisions: What difference does it make to him whether his net is sold according to law or in violation of law? Assuming that the act is unconstitutional, as I have undertaken to show, the argument proves too much and destroys the right of the citizen

in any case to demand that his life, liberty or property be taken only by "the law of the land." It is said if he has not violated the law, he may show it—if he has, it is a matter of no concern to him that he is punished without due process of law. It is sometimes well to test the strength of a proposition by putting an extreme case. The Legislature fixes the punishment of murder, the Constitution provides that no man shall be put upon his trial for murder except by indictment by a grand jury, or convicted but by the unanimous verdict of a jury. The Legislature, deeming it a useless and expensive proceeding involving delay, etc., authorizes any sheriff or constable, upon being satisfied that a person has committed murder, to forthwith arrest and hang him. The citizen commits the crime, information is duly given, the sheriff proceeds to execute the legislative will; application is made to a judge for a writ of *habeas corpus* in which guilt is admitted. The sheriff finds that this court has decided that by admitting guilt, the petitioner waives or forfeits his right to be hanged, according to the expensive requirements of the law of the land, and so avers in his return to the writ. To the suggestion that the plaintiff may in this action litigate his constitutional rights, it is sufficient to say that the question is not whether in some way, but whether in the act itself or by some general law applicable to all such cases, provision is made for hearing before confiscation. In *Stewart v. Palmer*, 74 N. Y., 183, the same suggestion was made in regard to a revenue law a statute empowering a board of assessors to assess property for local improvements, without notice to the owner. Application was made for an injunction restraining the enforcement of an assessment upon the ground that no notice was required by the statute. The defendant answered that conceding plaintiff's contention, he was not in a position to insist upon his rights because, in fact, the assessment was fair. *Earle, J.*, said: "The constitutional validity of law is to be tested, not by what has been done

under it, but by what may by its authority be done." It is said in the opinion in chief, in response to the contention of the plaintiff, that before his nets are sold, he is entitled to have the fact determined by a court whether he has incurred the penalty,—"So he has, but it can be asserted in this very action * * * He has his full remedy, but it does not include a continuance of the nuisance," etc. I am not quite sure that I comprehend the import of this language. The opinion maintains that he has no right to demand a hearing as a condition precedent to the sale of his nets—but it seems by the language quoted that such is not the conclusion reached by the court. Again it is assumed that the right of the Legislature to authorize "the prompt abatement of fishing nets at the inlets" is denied. On the contrary, I concede the right. I concede that the nets may be removed and if necessarily incident to the removal, they may be destroyed. Severe penalties by way of fine, and punishment by way of imprisonment, may be imposed. The only restriction on the power of the Legislature is that such punishment shall not be cruel and unusual. I concede further that as a part of the punishment the nets may be sold, etc. The right to do any and all of these things otherwise than by the law of the land—due process of law, I deny. With all possible deference I must be permitted to say that my convictions in respect to the right of the citizen of this State under the Constitution are not shaken by referring to "the law as recognized even as far as India." I have no doubt that in Turkey, Russia and many other jurisdictions in which the rights of the people come *ex gratia* from sovereigns ruling by some supposed Divine right, life, liberty, and property may be taken without any process other than the edict of the sovereign. In the light of the uniform judicial expression to the contrary in this country, I must dissent from the proposition that "in the exercise of the police power the General Assembly is not restricted to indictment, but may proceed by summary process of abate-

ment of the nuisance and imposing as a penalty the forfeiture or destruction (as it may deem best) of the article illegally used." If this is the law, and as the majority of this court so hold it must be the law of this state, I am at a loss to see where the limitations upon the power of the Legislature have any place or virtue. If I am correct in this opinion, this case marks an epoch in our jurisprudence and stands forth as a departure from the ancient landmarks made by the fathers for the protection of life, liberty and property. The decision reverses not only adjudged cases in this court, but the entire conception of our system of government and rules of construction of our Constitution. I write with the utmost respect and deference, but with earnest convictions. The question here is not whether the plaintiff shall be permitted to violate the law or whether the State has the power to prevent, by punishing him, nor is it whether a valuable resource of the State for feeding the people shall be sacrificed, but whether the plaintiff or any other citizen shall be deprived of his property otherwise than by the law of the land. Without regard to the value of his nets or the character of his offense this question is paramount to all others. If the plaintiff may be deprived of his property without due process of law, what guaranty is left that any and all other citizens may not suffer in like manner. It was only at the last term of this court that we found a corporation claiming sovereign power to destroy valuable property to meet a supposed public necessity. *Brown v. Electric Co.*, 138 N. C., 533. At each term we are called upon to stay the hand of power "in its eccentric course" and protect the citizen in his rights. We may not safely listen to the suggestion that public necessity demands that we sustain doubtful power in either department of the government. It is not necessary to go beyond our own time or country or the records of this court to find painful reminders that, except for the protection of these safeguards, men would have been done to death, or imprisoned by executive

and ministerial officers, in defiance of the law of the land. Sure, swift and cheap methods of punishment appeal very strongly to a sometimes dominant sentiment. The protection of the shad fisheries of the Albemarle should be secured and the plaintiff should be compelled to obey the law, but it is neither necessary nor wise to accomplish these desirable results by "weakening the importance of the preservation in ever so slight a degree of constitutional guaranties."

WALKER, J., concurring in dissenting opinion: It seemed to me at first that the plaintiff must fail in his action, as the seizure of the nets for the purpose of removing the obstruction to the free passage of fish and thereby abating a nuisance, was lawful, and the cost and expense of making the removal being therefore a just charge against him, the officer could hold and sell the property and apply the proceeds to their payment, even though he could not retain the surplus for the purpose of being turned into the school fund as directed by the Act of 1905, chapter 292, section 9, the Legislature not having provided for a judicial determination of the fact of forfeiture. This would be so, and I would still be of the same opinion, if the defendant had offered to surrender the nets to the plaintiff upon his paying the reasonable cost and expenses of removing them. *Hellen v. Noe,* 25 N. C., 493. The record shows, however, that this he did not do, but, on the contrary, when the plaintiff demanded possession of the nets, he refused to give them up and insisted on his right to hold and sell them, not only for the necessary cost and expense of their removal from the water, but also in order to apply the surplus to the purpose indicated in the statute. Plaintiff did not tender the costs and charges of such removal, it is true, but the defendant's refusal to comply with his demand for the reason he gave and his virtual denial that plaintiff had any right whatever in the property because it had been forfeited, dispensed with the necessity of any formal

tender by the latter of the amount of the cost and expense incurred by the officer in seizing and removing the nets (28 Am. & Eng. Enc. (2nd Ed.), page 7). The question is then presented, whether the officer had the right to refuse compliance with the plaintiff's demand, for the reason that he was justified by the statute in holding the nets and selling the same, not only to pay the cost and expense of seizure, but to apply the surplus to the school fund. If he claimed too much, his plea of justification cannot be sustained. After the most careful consideration of the question thus raised and an examination of the authorities, my opinion is that the Legislature could not decree a forfeiture of the nets by virtue of its own enactment nor without some kind of procedure to determine the guilt of the plaintiff or the liability of his property to forfeiture. There must be some inquiry, having at least the form or semblance of judicial investigation. I therefore concur in the dissenting opinion of *Justice Connor* to this extent and in the conclusion he has reached, that we cannot hold the Act of 1905 to be valid throughout without denying to the plaintiff the right to be heard in defense of his property, which is clearly guaranteed by the Constitution, and without depriving him of that property contrary to the law of the land. Const., Article I., section 17. Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscation without judicial hearing after due notice, is void, as not being due process of law. *Lowry v. Rainwater*, 70 Mo., 152. Broad as is the police power, it is, like every other, subject to the restrictions of the organic law, State and Federal. It is paramount when the particular case falls within its scope, but the Legislature cannot conclusively establish that such is the nature of the case, and the decision of that body may, where there is a plain excess or usurpation, be reversed by the judiciary or rather nullified. This results from the constitutional provision that no man shall be deprived of his life, liberty or property without due process of

law, which would be an idle declaration of right and nugatory, if a bald recital in an act of Assembly could oust the jurisdiction of the courts. 2 Hare's Am. Con. Law., 772. It is the plain duty of the courts to see that the Legislature, in the exercise of its police power, keeps within established constitutional limitations. Tiedman Law of Police Power, section 135. Its power over subjects of police regulation is not unlimited or arbitrary, and it should go no farther in the destruction or confiscation of the rights and property of the citizen, while exercising this power, than is required for the attainment of the end in view. An unnecessary invasion of the rights of the citizen in such a case is an excessive exercise of the power and is unwarranted.

The question is not merely whether the nets were placed in the prohibited waters in violation of the statute, but whether the method by which the title of the plaintiff to his property was attempted to be divested and transferred to another, was without constitutional sanction. *Varden v. Mount,* 78 Ky., 86. It seems clear to me, that the solution of the question we have in hand, cannot be made to depend upon the bare necessity or exigency of the case arising out of the peculiar nature of the property and the facility with which it can be returned to the place in the water from which it was taken, if it should be restored to the possession of the owner. This argument could be applied to most any species of movable property and would practically nullify the provisions of the Constitution which afford protection to the citizen in the possession, use and enjoyment of his property. Besides, the premise upon which the argument is based, ignores the fact that the plaintiff, if so minded, could procure other property of a like kind and continue the obstruction of the stream, but on the contrary, it is assumed that the confiscation of the nets and their sale will effectually abate the alleged nuisance. The sale of the nets does not necessarily put them beyond the owner's reach. The reasoning

will, as well, and with as much force, apply to other kinds of property as to fish nets. They cannot be replaced in the water and again be employed in their unlawful use with any more ease, or any less secrecy, than can the master return his vessel, which has been used in unlawfully taking oysters from their beds, to the place of its former depredations and continue in his illegal business, and it must be conceded that the vessel cannot be destroyed or forfeited, unless absolutely necessary to suppress the wrong. *Boggs v. Com.*, 76 Va., 989; *Colon v. Fisk,* 153 N. Y., 188. The vessel is a larger object and can be better seen at its work, but if the nets are used for catching fish, which must at stated periods be taken from them, the publicity is just as great in the one case as in the other. The argument is founded upon a principle of preventive, rather than upon one of retributive or punitive justice. But if the nuisance can be abated, or the obstruction, which constitutes the nuisance, can be removed from the waters, has the State any more power to take property to prevent a repetition of the offense, without due process of law, than it has to punish the offender for the act already done? Whatever view we take of the matter, we are constantly confronted by this limitation on the power of the State, that it can exercise none which deprives the owner of his property, except to protect or promote the public interests and then only after due process, unless there is urgent necessity for the immediate destruction of the property. This necessity is not presented when the State merely seeks to prevent the repetition of an offense, except in very rare and exceptional cases not embracing this one, or when she undertakes to declare a forfeiture, for the same purpose and with the same intent as she imposes a penalty or inflicts punishment. It is to be doubted, if it should not be strenuously denied, that the Legislature can even go to the extent of authorizing the destruction of the nets, in which case the argument might be stronger and more effective, without giving the owner an

opportunity to be heard as to the unlawful use of his property, where the necessity to destroy it does not exist. I take it that the right to summarily destroy the property of the citizen for the purpose of abating a nuisance, or in the exercise of any other police power, is confined to cases where the destruction is necessary to effect the abatement or to the full exercise of the police power, and that it does not exist, when, for instance, the nuisance can be thoroughly abated and at the same time the property unlawfully used to create it be restored to the citizen, the right itself being one which arises out of and is commensurate with the necessity and is limited by its demands.

I do not deny that the forfeiture or the destruction of property may not be declared as a penalty or as a punishment annexed to the commission of the unlawful act which constitutes the nuisance, but in such a case it must be admitted that the citizen has a clear and unquestionable right to notice and an opportunity to be heard in his defense. This proposition is too plain for argument and does not call for the citation of authorities, though the latter are abundant. Referring to this question in *Fisher v. McGirr*, 1 Gray, 36, *Shaw, C. J.*, says: "Such being the character of the prosecution, in a high degree penal in its operation and consequences, it should be surrounded with all the safeguards necessary to the security of the innocent. The party should have notice of the charge of guilty purpose upon which his property is declared to be unlawfully held and in danger of being forfeited and a time and opportunity to meet the witnesses against him face to face." The same doctrine is strongly stated by *Judge Story* in *Bradstreet v. Ins. Co.*, 3 Sumner, 601. "It is a rule," says he, "founded on the first principles of justice, that a party shall have an opportunity of being heard in his defense before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate and clear." In *Windsor v. McVeigh*,

93 U. S., 279, the court says: "The jurisdiction acquired by the seizure of the property is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner, and parties interested, to appear and be heard upon the charges. To this end, some notification of the proceedings beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or a publication in some other form. The manner of the notification is immaterial, but the notification is indispensable." In *McVeigh v. U. S.*, 78 U. S., 259, it was said that the right to declare a forfeiture of property must be exercised only in such way as to give the owner an opportunity to appear and defend, and that this right to be heard existed even in favor of a person then within the Confederate lines, whose property was sought to be condemned in a court of the United States. "It was alleged," says *Swayne, J.*, for the court, "that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The property of the citizen cannot be seized except for a violation of the law, and whether he has been guilty of such violation cannot be left to police officers or oyster inspectors to determine. *Darst v. People*, 51 Ill., 286. There is no more legislative power to authorize ministerial officers to perform judicial acts of this character than there is to authorize them, at their discretion, to assess a fine upon a citizen and seize his property for its payment without inquiry before a court or an opportunity of being heard in his own defense. *Ibid.*, 287. The right of the citizen in this respect

is strikingly illustrated by the case of *Boggs v. Commissioners*, 76 Va., 989, in which is the following clear statement of the principle: "It is said that the proceedings under the liquor law may be so conducted consistently with its provisions as to secure to the person whose property is seized all his constitutional rights. If this is possible that is not enough. The law must afford to the accused the means of demanding and enforcing his constitutional rights and if it authorized a course of procedure which would deprive him of this, it is void. It is not to be left to the discretion of prosecutor or magistrates to adopt a course of procedure which may or may not be in conformity with the requisitions of the Constitution as they may elect."

It may be conceded that when the necessity of the case, by reason of the situation of the property and the peculiar circumstances, requires its destruction in order to abate a nuisance, the property may be destroyed, and yet it would not justify this defendant, for no such necessity existed here, as the nuisance was fully and completely abated by the removal of the nets from the water and the sale or other disposition of them afterwards by the officer could not therefore make its abatement more effectual or complete. The property of the citizen then was taken from him without notice or hearing, in a case where there was no necessity for doing so in order to accomplish the main purpose of the legislative act. In this connection the language of the court in *Varden v. Mount*, 78 Ky., 86, with reference to a kindred question is peculiarly appropriate: "The right to forfeit without citation and without hearing can only exist from necessity. That right in this instance should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin. If the ordinance had been violated, appellant may be compelled to pay the fees for impounding and keeping the hogs, but

their payment cannot be enforced by forfeiture without judicial determination."

The police power therefore should be exercised with due regard for private rights and the constitutional safeguards thrown around the rights of property are not to be demolished for any less reason than that the public interests imperatively demand it and no time or opportunity is afforded for their due observance. It is desirable that a way should be left open for the free passage of fish in the sounds, but the benefits to be derived therefrom must be regarded as inconsiderable in comparison with the value of the guaranties of the Constitution, which secure to the citizen his liberty and his property. A full recognition of the right of the State to adopt and vigorously enforce measures for the suppression of nuisances does not ordinarily require any sacrifice of the rights or property of the citizen, and they should, when possible, be made to harmonize with constitutional provisions, and inconsiderate legislation which disregards them should not be upheld. Summary and extreme measures should not be resorted to if, without serious detriment to the public interests, the purpose can otherwise be accomplished. *Lowry v. Rainwater, supra.*

This court was among the first to assert this right of the citizen to be protected in the use and enjoyment of his property, and not to be unreasonably deprived thereof. *Bayard v. Singleton,* 1 N. C., 5. And this case was followed in quick succession by others equally as pronounced in their assertion and vindication of the right of property to protection under the Constitution against forfeiture or any sort of condemnation, contrary to the law of the land or, what is the same thing, without due process of law. *Hamilton v. Adams,* 6 N. C., 161; *Robinson v. Barfield,* 6 N. C., 391; *Hoke v. Henderson,* 15 N. C., 15. In *Shaw v. Kennedy,* 4 N. C., 591, discussing the identical question we are now considering, the court, by *Seawell, J.,* (in words which cannot be too often

repeated) says: "The laws of the land, or, in other words, those laws which do operate over the *whole country* without being directed to any place or particular individual, allow to every person the opportunity of defending his property before it is condemned; and in no case leave it to the mercy of a mere ministerial officer, to seize it at will, which seizure is to be lawful or not, according to his own will and pleasure. The ordinance, therefore, on that account, was unauthorized and consequently void." This case has been cited with approval. *Hellen v. Noe,* 25 N. C., 493. I am unable to perceive any substantial difference between *Shaw v. Kennedy,* and the case now under review. In the former case a migratory hog had strayed into a town and was seized and held as forfeited, under the provision of an ordinance condemning him, as a nuisance, to be sold, and directing the proceeds to be applied to the payment of the cost of impounding him, and the balance to the joint use of the constable and the town, without giving the owner any opportunity to be heard. This was held to be a clear violation of his constitutional right. There was no reason in that case why the hog should not have been forfeited, which does not with equal force apply to the facts of this case. One was an animate and the other is an inanimate thing, but both are property and under the protection of the same law against wrongful invasion.

If the value of the property can be considered in determining whether there is due process of law in the particular case, it should not have any weight with us in the decision of this case, as it does not appear that the value of the nets is less than the cost and expense of removal. Indeed, the inference, if it can be drawn from what does appear, should be that it is not. But I do not think the value of the property has anything to do with the question or that it should affect the application of the principle in the least. The right of the owner is to have it judicially determined that his property has been forfeited, and this determination must necessarily

precede condemnation for any purpose. It can be destroyed to abate the nuisance when the exigency of the situation requires it, because of the paramount right of the State to do so in promotion of the public good, and the interest of the individual will not be permitted to stand in the way. (*Privatum incommodum publico bono pensatur*). This is upon the ground of public policy based upon the maxim that regard is to be had to the public welfare, as the highest law, there being an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property shall under certain circumstances be placed in jeopardy or even sacrificed for the public good. Broom's Legal Maxims (8th Ed.), 1. But the emergency must exist before the right can accrue to the State, and if it does not exist the owner is not required to submit to the destruction of his property and it cannot be condemned for any purpose without a hearing. The right of the State depends upon the existence of the necessity for destruction or other summary proceeding, and not upon the value of the property, and surely the State cannot merely condemn the property by forfeiture to its own use or to any public use without a hearing, as there is no necessity for such action. The fisherman's net may be of little intrinsic value, but if it is forfeited the loss to the owner may be far beyond its inherent worth. Whether of great or little value, it is his and cannot be taken from him even by the most powerful, or by sovereignty itself, except in accordance with the law of the land. That is the shield of the humblest as well as of the most exalted citizen. What is said by the court in *Coleman v. Railroad*, 138 N. C., 357, aptly and forcibly expresses this thought: "The plaintiff may be an humble individual and the damages may or may not turn out to be slight. But in the history of English law, many important rights have been declared in similar instances of obscure complainants, and where the wrong was not of great note by reason of its effect in that particular case."

BYRD v. EXPRESS CO.

(Filed October 17, 1905).

Negligence—Evidence—Proximate Cause—Section 1498—Damages.

1. In an action by the plaintiff to recover damages for the death of his intestate, the burden is upon the plaintiff to show that the defendant's alleged negligence proximately caused the intestate's death, and the proof must be of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact.

2. In an action to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant in failing to forward a package of medicine for the intestate who was ill with typhoid fever, where the attending physician testified that he believed the chances of recovery would have been better had the medicine been received in time and taken according to directions, and that was as far as he could go, and that the medicine was needful and necessary, a motion to nonsuit was properly allowed, as the evidence does not tend to show that the failure to receive the medicine caused the intestate's death.

3. Where the plaintiff brings an action, under section 1498 of The Code, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child.

ACTION by Rufus Byrd, Administrator of James E. Byrd, against Southern Express Co., heard by *Judge G. S. Ferguson* and a jury, at the May Term, 1905, of the Superior Court of CUMBERLAND County. From a judgment of nonsuit, the plaintiff appealed.

Plaintiff sued to recover damages for the death of his intestate alleged to have been caused by the negligence of the defendant. The intestate, plaintiff's son, about eighteen years old, was ill with typhoid fever at Wade, N. C., on Sep-

tember 11, 1903. His physician, early in the day, gave a prescription for him to a druggist at Fayetteville, who prepared the medicine and handed the package containing it to the agent of defendant company at that place to be sent to Wade, a station on the railroad about twelve miles north of Fayetteville, where the plaintiff with his family resided. The package was received by defendant's agent about fifty-five minutes before the train was due to leave for Wade, and the agent was told that it was important to ship at once, as it contained medicine for a man who was sick. It was not forwarded that day and plaintiff did not receive it until he came to Fayetteville the next morning and got it from the defendant. There was testimony, not necessary to be stated, which clearly shows that no contributory negligence was imputable to the plaintiff in not going to Fayetteville sooner than he did. The attending physician testified, in answer to a question as to the effect the delay in receiving the medicine had upon the patient, that the loss of time would necessarily cause a break "in the chain of treatment," and would in his opinion lessen the chances of recovery; that he had an aggravated form of typhoid fever, and in such case it is required that the patient should have his medicine as regularly as possible. When asked whether, if the medicine had been received in time and taken according to his directions, it would probably have effected a cure or saved his patient's life, he answered that the prognosis in all aggravated cases of typhoid fever is very grave, and he believed that had there been no interruption in the course of treatment, the chances of recovery would have been better and that was as far as he could go. He was then asked if, in the condition of the boy at the time, it was necessary for his recovery that the medicine he prescribed should be taken at noon on the 11th day of September, and he answered as follows: "I would say that was the hope; the medicine was needful and necessary." A mo-

tion by the defendant for a nonsuit was sustained. Plaintiff excepted and appealed.

Thos H. Sutton for plaintiff.
Rose & Rose and *Robinson & Shaw* for defendant.

WALKER, J., after stating the case: If it is conceded that there was negligence on the part of defendant, we do not think there was sufficient evidence to be submitted to the jury that it caused the death of the plaintiff's intestate. There must always, in actions of this kind, be a causal connection between the alleged act of negligence and the injury which is supposed to have resulted therefrom. The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the proximate cause of the injury. Shear. & Redf. on Negligence (4th Ed.), sections 25 and 26. The burden was therefore upon the plaintiff to show that defendant's alleged negligence proximately caused his intestate's death, and the proof should have been of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact.

In *State v. Vinson,* 63 N. C., 335, this court thus states the rule: "We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficent foundation for a verdict and should not be left to the jury." And in *Brown v. Kinsey,* 81 N. C., 245, it is said: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant

the inference of the fact in issue, or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." In the later case of *Young v. Railroad*, 116 N. C., 932, the court says: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Cobb v. Fogalman*, 23 N. C., 440; *Wittkowsky v. Wasson*, 71 N. C., 451; *Sutton v. Madre*, 47 N. C., 320; *Pettiford v. Mayo*, 117 N. C., 27; *Lewis v. Steamship Co.*, 132 N. C., 904. In the last cited case, the subject is fully discussed by *Connor, J.*, and the cases collected. It all comes to this that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success. This has not been done in the case now before us. The right of recovery turns upon the testimony of the physician. He nowhere says that if the medicine had been administered at the time fixed in his directions, the child would have recovered or that in his opinion its recovery was even probable. It is evident that the doctor was unwilling to hazard such an opinion and well might he have refrained from venturing so far. It must be admitted that he prescribed what he thought was best for the child and directed it to be taken as soon as possible, in the hope of arresting the rapidly increasing ravages of this terrible disease, which was fast sapping the life of his patient, but it was hardly within the range of his knowledge to tell afterwards, with any degree of certainty, what the result would have been if his directions had been strictly followed. Under the circumstances of this case, it would be barely more than a guess, there being no certain data or process of reasoning

upon which he could rely for an intelligent opinion. At any rate, the doctor was cautious enough to reduce to the narrowest limit the scope of his answer to the plaintiff's question as to the probable result of a compliance with his directions, when he said "that the chances of recovery would have been better; that is as far as I can go." But this falls very short of tending to prove that the failure to receive the medicine caused the intestate's death. The witness does not say the boy would have recovered, nor that, if the chances of recovery had been increased by taking the medicine at the appointed time, they would still be in his favor or against him. The condition of the patient might have been somewhat improved and yet the chances of recovery still have been decidedly against him, or the prospect of ultimate recovery hopeless. Nor do we think that this uncertain and most unsatisfactory proof was aided in the least by what was afterwards said by the witness. He plainly did not intend to go beyond what he had already said. All that can be legitimately inferred from his last answer is, that he entertained a hope that the medicine would stay the progress of the malady, and that he deemed it necessary for the boy to take the medicine at the time indicated in his instructions to the father. But it could hardly be said that this evidence was of the kind required by the law as a sufficient and reliable basis for a verdict. It would not be at all safe to form a conclusion on such proof, as the jury must not guess, but decide; they must use, not their imagination, but their reason; and there is no room here for anything more certain than rank conjecture.

The plaintiff brings this action as administrator of his son to recover the value of his life under the statute (Code, section 1498), and of course he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. Such damages can be assessed only in an action brought in his own name, if at all.

We think His Honor was right in dismissing the action.

No Error.

KELLY v. ODUM.

(Filed October 17, 1905).

Executors and Administrators—Allowances for Attorneys' Fees—Good Faith of Representative—Costs.

1. A personal representative has the right to employ an attorney whenever it is necessary to protect the estate, or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services.

2. Such an allowance is always based upon the prudence and good faith of the trustee, and credit will not be given if litigation has been improperly instituted by him or was the result or consequence of his neglect, or improper conduct, benefit to the estate being generally necessary to charge the estate with an expenditure of this character.

3. Where an administrator c. t. a. made no defense to a suit brought by his father, but permitted judgment to be taken by default, and then brought a proceeding to charge the land of his testator with the payment of the judgment thus obtained, and two juries decided that there was nothing due to his father, *held*, that it was error to tax against the defendant, who was a purchaser from the devisees, as a part of the costs, an allowance for attorney's fee paid by the administrator for bringing and prosecuting the latter proceeding.

4. An executor is always personally liable to his counsel for his fee, but it is in no sense a debt of the estate.

ACTION by Ira L. Kelly, Administrator, with the will annexed of T. K. Byrd, against S. R. Odum and others, heard by *Judge O. H. Allen*, at the May Term, 1905, of the Superior Court of SAMPSON County, upon the referee's report on a motion to retax the bill of costs. From a judgment in favor of the plaintiff, the defendant, Odum, appealed.

The executor of the will of T. K. Byrd having renounced, the plaintiff qualified as administrator with the will annexed,

and on the day of his qualification was sued by his father, Thomas Kelly, before a magistrate, for one hundred dollars alleged to be due by the testator for services rendered in nursing him. Plaintiff did not resist a recovery, but permitted judgment to be taken by default. This was in 1891. Plaintiff then commenced this proceeding to have the testator's land sold to pay said judgment and a debt to another party of $7.50 due for medical services, which was admitted. The land was bought from the devisees by the defendant, who denied that anything was due to Thomas Kelly, and, it seems, impeached the judgment taken before the magistrate as having been obtained fraudulently. An issue was submitted to the jury, based upon this defense, who found that there was nothing due to Thos. Kelly. This verdict was set aside and the issue was submitted to another jury at a subsequent term, who found in the same way, that there was nothing due. Defendant was adjudged to pay the costs of the proceeding and the charges of administration. The clerk taxed in the bill $20 for attorney's fee paid for bringing and prosecuting this proceeding, to which exception was taken by the defendant. The court directed the clerk as referee to ascertain and report if the services for which the fee was charged were rendered "in the interest of a fair administration of the estate and was a reasonable allowance." The clerk reported "as a fact" that the services were rendered "in the interest of a fair administration of the estate," and that $20 was not an unreasonable charge therefor. The court thereupon rendered judgment against the defendant for the costs and charges, including said fee. Defendant excepted and appealed.

Grady & Graham for the plaintiff.
Geo. E. Butler and *J. D. Kerr* for the defendant.

WALKER, J., after stating the case: The statute provides that an executor may be allowed commissions and may retain

for necessary charges and disbursements in the management of the estate. Code, section 1524. Compensation is allowed in order to reward him, not only for his time, labor and trouble in administering the estate committed to his charge, but also for the responsibility incurred and for the fidelity with which he discharges the duties of his trust—the theory of compensation being that it is incident to faithful administration—and it should not be allowed if there has been neglect or improper conduct whereby the estate has suffered loss. In the case of charges and disbursements the same rule applies, and the statute provides that they must have been necessary to a proper management of the estate. Included in legal charges and disbursements, are sums paid to an attorney or counsel for professional services rendered to the personal representative. The latter has the right, unless restricted by statute, as he is not in this State, to employ an attorney whenever it is necessary to protect the estate or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services. 11 Am. & Eng. Enc. of Law (2nd Ed.), pages 1240 and 1282. It has ever been the ruling of this court, founded of course to some extent upon the provision of the statute, that reasonable fees paid counsel for advice and assistance in the management of a trust, and even in meeting a demand by action for a settlement, will be allowed to the trustee, whenever the services were necessary or proper and the payment made fairly on account of the trust estate. *Young v. Kennedy*, 95 N. C., 265; *Hester v. Hester*, 38 N. C., 1; *Love v. Love*, 40 N. C., 201; *Fairbairn v. Fisher*, 58 N. C., 385; *Whitford v. Foy*, 65 N. C., 265. We have recognized and applied the general principle at this term in *Lumber Co. v. Pollock*.

But while such an allowance will be made, it must be remembered that it is always based upon the prudence and good

faith of the trustee. Therefore, the credit will not be given if litigation has been improperly instituted by him or was the result or consequence of his neglect or improper conduct, benefit to the estate being generally necessary to charge the estate with an expenditure of this character. Commissions and allowances, as we have shown, are both intended as a recompense for honest and faithful service only, and are never awarded to one who has been guilty of a breach of duty. *Johnston v. Haynes,* 68 N. C., 509; *Whitford v. Foy, supra; Grant v. Reese,* 94 N. C., 720; 11 Am. & Eng. Enc., *supra,* 1281. Applying this just and well settled principle to our case, we find that the plaintiff made no defense to his father's suit, which followed upon the very heels of his administration, but allowed judgment to be taken without any effort being made to ascertain the justness of the claim preferred. He immediately brought this suit to charge the land of his testator with the payment of the judgment thus obtained, and two juries have decided that there is nothing due to his father. The attack on the judgment is made directly, and it appears that it was founded upon an allegation of collusion or connivance. We take it that this was the true ground, as the jurisdiction of the justice must be conceded, and there was no other suggested, nor can we conceive of any other under the circumstances. *Earp v. Minton,* 138 N. C., 202. If the plaintiff had resisted the claim at the proper time, and in the proper way, that is, in the magistrate's court, and by defending the action there, this proceeding would perhaps not have been necessary, and the developments tend clearly to show that it would not have been. Instead of doing so, he is now placed in the attitude of prosecuting for his father a claim against the devisees, which two juries have said is absolutely without any merit. It would indeed be hard measure if the law should charge the defendants with the expenses incurred in such a prosecution. Fortunately, we are able to think that it does not, and we so declare. The rule

requiring perfect good faith on the part of the trustee in such cases is a wholesome one, and we are not disposed to abate its stringency or to stay in the least its full operation. It may be that the alleged debt is a just one; if so, it is the misfortune of the plaintiff that he has not succeeded in convincing either of the two juries of the fact. Whether in any case he should be allowed the amount of an attorney's fee paid in attempting to charge his testator's estate with the payment of a debt, and thereby espousing the cause of a creditor, is a question which it is not necessary for us to decide.

The plaintiff has paid his attorney, and properly, as he was clearly liable to him. What we have said has no application as between them. An executor is always personally liable to his counsel for his fee or compensation, but it is in no sense a debt of the estate. He is liable in such case in his individual and not in his official capacity. This is perfectly familiar learning. *McKay & Devane v. Royal*, 52 N. C., 426; *Banking Co. v. Morehead*, 122 N. C., 323; *Lindsay v. Darden*, 124 N. C., 309. As *Pearson, J.*, said for the court, in *Hailey v. Wheeler*, 49 N. C., 159, "It is not possible to conceive how a debt of the testator can be created by a matter occurring wholly in the executor's time." But if the disbursement is found to be a proper one, it will be allowed to the executor in his settlement. In this case we hold that, however reasonable and just the disbursement may have been as between the plaintiff and his attorney, it is not a proper charge against the defendant, and it will be stricken from the bill.

There was error in the ruling of the court.

Error.

COZARD v. HARDWOOD CO.

(Filed October 17, 1905).

Tramways—Constitutional Law—Injunctions—Eminent Domain—Public Use—Timber Lands.

1. The fact that proceedings had been instituted before a Highway Commission to acquire a right of way for a tramway or railway, and were pending in the Superior Court, does not prevent the court interfering by injunction with the construction of the proposed railway, where the result of that proceeding could not affect the plaintiff's right to enjoin the defendants.

2. The amendment made to sections 2056-2057 of The Code, by chapter 46, Laws of 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional, in that private property can only be taken for a public use.

3. The question, what is a public use, is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive.

ACTION by H. O. Cozard against Kanawha Hardwood Co., heard by *Judge G. S. Ferguson* at Chambers, in Waynesville, N. C., on August 25, 1905, upon a motion by the defendants to dissolve the temporary restraining order theretofore granted. From an order continuing to the hearing the said restraining order, the defendants appealed.

Plaintiff alleged that he was the owner of a tract of land in Cherokee County, upon which he had erected a dwelling and planted a large number of fruit trees and made many other valuable improvements requiring outlay of many thousand dollars. That the defendants are partners conducting a general lumber business under the firm name and style of the Kanawha Hardwood Co. That defendants are threatening and pursuant to such threats proceeded to construct a

railway over and through his lands for the purpose of hauling timber and timber products from their own lands. That in grading the route for such railway and erecting trestles over the mountain, great and permanent damage will be done his property, etc. He applied to the resident judge of the district for a restraining order until the hearing and a permanent injunction, etc. Upon the return day of the order to show cause, His Honor, *Judge Ferguson,* upon hearing the complaint and answer supported by affidavits, found the following facts: The defendants, after notice, applied to the Highway Commission of Valleytown Township in said county for a right of way to construct and operate a private railroad from the town of Andrews, a railroad station on the Southern Railway, to standing timber owned by the defendants in Graham County, which right of way would pass over the plaintiff's land. The plaintiff filed an answer to the petition. From the order the Highway Commission, finding that it was necessary, reasonable and just that the petitioners should have the right of way, and appointing a jury to lay it off, plaintiff appealed to the Board of Commissioners of Cherokee County. From the order of the said Board of Commissioners, affirming the proceedings of the Highway Commission, the plaintiff appealed to the Superior Court. The appeal is now pending in said court. That the defendants are the owners of standing timber from which no public road leads and to which no water is convenient; that the proposed road leads from a railroad station to such standing timber, and that such standing timber cannot be marketed with a profit to the defendants without the construction of a railroad. That the construction of a railroad is necessary for the profitable marketing of such timber, and that the route across the plaintiff's land is a reasonable route; that in taking such route no injustice is done the plaintiff; that there is no reason why his land should not be taken as well as the land of any others over which the road might be constructed; that five

years will not be an unreasonable time in which to remove such standing timber.

Defendants have graded a considerable portion of the proposed road, not on the lands of the plaintff, but other portions of the proposed route; they have bought and contracted for iron rails, locomotives and other appliances for operating said road.

Defendants are not a corporation, and do not propose to become liable as common carriers, but propose to construct and use the road for their sole and exclusive use in removing their timber and timber products from their lands in Graham County to the railroad station at Andrews and to the markets. There are other large boundaries of timber land of like kind contiguous to the defendants' timber. Defendants do not propose to transport over their proposed railroad such timber for reasonable charges to be fixed by the Corporation Commission or other authority of the State. Defendants do not claim any other right to enter upon plaintiff's land other than such as they acquired by the order of the Highway Commission. His Honor upon the foregoing facts continued the injunction to the hearing. Defendants appealed.

Jones & Johnston and *Shepherd & Shepherd* for the plaintiff.

Dillard & Bell for the defendants.

CONNOR, J., after stating the case: The defendants insist that pending the proceeding instituted before the Highway Commission, the court should not interfere by injunction with the construction of their proposed railway. This contention would be unanswerable but for the fact that plaintiff insists that in no point of view can the result of that proceeding affect his right to enjoin defendants, for that, 1. No power is conferred upon the Highway Commission to order a

railway of the character or for the purpose contemplated by the defendants, to be laid out. 2. That if the statute undertook to confer such power it would be invalid, violating the elementary principle that private property can only be taken for a public use, and then with compensation.

These contentions render it necessary to examine the provisions of the statute creating the Highway Commission of Valleytown Township, chapter 210, Public Laws 1905.

By the first section of the statute, provision is made for electing three persons, who shall constitute the Highway Commission for said township, naming those who shall act until the time appointed for the first election. By the second section, the Commission is vested with the powers, rights, etc., exercised by the Board of Supervisors of Public Roads, etc. "They shall have full power and authority to order the laying out of public roads, etc. They shall also have power and authority to lay out cartways, rights of way for tramroads, church and mill roads, and to discontinue the same in the way and manner provided in sections 2033, 2056, 2057, 2062-63 of The Code, or any amendments thereof." It is clear that the Highway Commission established by the act has no larger or other power in regard to ordering cartways or tramways to be opened than is exercised by the boards having jurisdiction over such matters under the general public laws. It is equally clear that the road proposed to be opened and operated does not come within the definition of cartways provided by sections 2055-57 of The Code. This right is conferred only on persons "settled upon or cultivating any land." The cartway authorized to be opened, "shall be kept open for the free passage of all persons on foot or horseback, carts and wagons." Section 2057 provides that persons over whose lands cartways have been opened, "may erect gates or bars across the same." The section was amended by chapter 46, Laws 1887, by inserting in line one, the words "or shall own any standing timber," and in lines six and fif-

teen, between the words "cartway" and "to" the words "tram or railway." In line eighteen striking out the word "way" and inserting the words "cartways established under this act." Section 2057 is amended by inserting in line one the words "tram or railways" and by inserting in line six between the words "just" and "and" the words "cartways, tramways, or railways for the removal of timber shall continue for a period not longer than five years, and in entering cultivated land shall protect the same by sufficient stock guards." The effect of these amendments is to confer upon owners of land upon which there is any standing timber the right to have opened tramways or railways, with the exclusive use of them, confining to cartways the right of all persons to pass over them. The right to maintain such tramways or railways is confined to a period of five years, with the duty of erecting stock guards when they pass through cultivated land, thus depriving the owner of the land through which such tram and railways pass, the right to erect gates or bars across them. It appears that the Highway Commission ordered the laying out of a private way for a private railway through and over the plaintiff's land, with such curves and grades as are necessary according to the survey made in order to reach the lowest gap on top of the mountain * * * Said right of way, when it extends through woodland, or said tract, to be of the width of one hundred and fifty feet, and through cultivated fields or cleared land to be of sufficient width for the roadbed, trestles and cuts only.

The construction of section 2056 of The Code, being chapter 508, Acts 1798, providing for the opening of cartways, has been frequently before this court; its constitutionality has never been questioned and is not involved in this appeal. The validity of similar statutes has been discussed and sustained in other jurisdictions upon the ground that although established and opened upon the petition of private landowners, and primarily for their benefit, they are, as provided

by our statute, open for the free passage of all persons on horse, foot, in wagons or carts. This extension of their use impresses upon them a public character. In this way the power to invoke the right of eminent domain for the purpose of opening and maintaining them, is sustained. It is said, "Roads and streets used by the public with a right in all the public to use them, are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many persons do actually use them, but how many have a full and unrestricted right, in common, to use them; for if the public generally are excluded, the way must be regarded as a private one. If the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. When the way is a private one, the right of eminent domain cannot be successfully invoked * * * The right itself exists only for the public, and no private interest, however weighty, can call it into exercise. The question, therefore, must always be, not what private interests will be promoted, but what is the public requirement? The name given the way does not determine its character, for if a road be called a private road or a neighborhood road, but is in fact, so laid out and maintained as to give the public a right to freely use it, upon terms common to all, the road, notwithstanding its name, is a public one." Elliott on Roads (2nd Ed.), section 192. The converse of the proposition is stated in section 193, that if the road is so laid out as to give only a limited class of persons the sole right to use it, it is for that reason a private road, without regard to the name by which it is known or called. "If a class, to the exclusion of the citizens generally, acquire a right to use the road, it is no more than a private way." *Ibid.* Discussing the same question, it is said: "Where the road laid out on the application and paid for and kept in repair by a particular individual, who is especially accommodated thereby, is, in fact, a public

road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which the land may be condemned. But when the road, after being laid out, becomes the property of the applicant, from which he may lawfully exclude the public, then the use is strictly private and the law authorizing the condemnation of property is void." Lewis Em. Dom., 167. Speaking of private cartways over which the public are allowed to pass, the author says: "The roads here provided for are *quasi* public, and have been sustained as a valid exercise of the power of eminent domain * * * It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified." *Ibid.* A statute similar to section 2057, as amended by chapter 46, Laws 1887, was enacted by the Legislature of Pennsylvania for the benefit of owners of land upon which there were deposits of anthracite coal. In *Waddell's Appeal,* 84 Pa. St., 90, the validity of the act was discussed and denied because the way authorized to be opened was not for the use of the public. The Supreme Court of Indiana in *Wild v. Deig,* 43 Ind., 455, said: "Concede that the public exigency requires that a way should be opened to every man's farm, and that the State may and should provide for the establishment of a public road or highway to enable every citizen to discharge his duties and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, then the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of a highway by the public, that distinguishes it from a private way or road. It is the *right* to so use or travel upon it—not its exercise." In a well considered opinion delivered by *Dillon,*

C. J., (*Bankhead v. Brown*, 25 Iowa, 540), it is said: "Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially *private?* For it must be private if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it."

The defendants' counsel, in an able and interesting argument before us, conceding the general principle governing the right to take private property, or impose burdens thereon, insist that by reason of the peculiar conditions developed by the affidavits in the record, the use for which the plaintiff's land is sought to be subjected to the easement, is public in its character. They call to our attention the large and valuable timber standing upon the mountains of Western North Carolina, the removal and marketing of which brings wealth into the State, opens the land to cultivation and homes for the people now there and who are coming into that section of the State. They say that while the logs may be hauled over the mountain roads, but at very large expense, the portions of the trees, limbs, tops, etc., unfit for lumber, which are now wasted, may be made useful and valuable for many purposes, and that it is their purpose to establish tanneries and factories for utilizing these products, etc. That by these means the revenues of the State will be increased, the development of the natural resources encouraged, immigration brought into that section, and many other benefits accrue to the public. These views, with the facts upon which they were based, were presented with much force by counsel. They have received, as they were entitled to, most careful consideration. They have been made in other cases in other courts. They invite courts to find in the term "public use" a broader and larger meaning. Their persuading and almost compelling

force may be seen in the legislation of the States and the decisions of the courts. While they have, in some cases, stimulated material growth and development, it is manifest that valuable private property rights and stores of natural wealth and resources for feeding, clothing and making comfortable the rapidly increasing population have been sacrificed to them. That great and dangerous monopolies have been fostered by the liberal construction put upon the term "public use." It has sometimes happened that a stubborn and possibly sentimental owner of land has stood in the way of the development of the country and of the impatient, strenuous promoter and industrial pioneer. It may be that his rights have not received either in the Legislature or the courts the consideration to which they were entitled. It is conceded that courts and authors have found much difficulty in defining the term. It does not concern us to attempt to do so to any other or further extent than is necessary to a decision of this appeal. Mr. Lewis, after an interesting discussion of the subject, says: "Perhaps no better example of a public use can be given than that of the ordinary highway, when the easement or right of way vests in the public for the common and equal use of all." Section 166. The terms upon which the public may use the highway are of course subject to legislative regulation, as on railroads or steamboats, by paying the prescribed fare, going upon and leaving at regular stations, and conforming to those reasonable regulations made by the corporation or other agency for the protection of the public; and on the ordinary country highways, by conforming to those statutes or immemorial customs which have become the "law of the road," etc. In *Pittsburg, etc., R. Co. v. Iron Works,* 2 L. R. A., 680 (West Va.), the term "public use" as applied to the right of a railroad company to condemn private property for the purpose of constructing a lateral road to reach a particular customer, is discussed and the authorities reviewed, *Johnson, P.,* concluding his opin-

ion: "As far as the public is concerned, when what they need is for 'public use,' they have a right to invoke the exercise of eminent domain; but in so far as that which concerns them as to their private interests, their profits and gains is concerned, they stand as individuals or as merely private corporations in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain."

In reply to the argument of counsel that by such holding a deadly blow was aimed at the industires of the State, the learned judge said: "It seems to us if railroad corporations were permitted *ad libitum* to do what this defendant in error asks to be done, no deadlier blow could be dealt at the private rights of the citizen." "The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only permission, and not to whom the tax or toll for supporting them is paid." Note, 2 L. R. A., 682; 15 Cyc., 583; *Board of Health v. Van Hoesen,* 87 Mich., 533; 14 L. R. A., 114.

The question presented by this appeal and the argument to sustain the right was discussed in *Healy Lumber Co. v. Morris,* 63 L. R. A., 820 (Wash.). A statute similar to ours, as amended, was enacted, enabling owners of timbered lands to condemn a right of way for tramroads and railroads for the purpose of transporting timber to market. The exact question before us was presented, *Dunbar, J.,* saying: "This case presents the important question, deserving the most serious consideration, involving as it does the respective interests of private rights and of property of the State sought to be protected and fostered through the exercise of the high prerogative of sovereignty; the former being guaranteed by the fundamental law, and the latter being the subject of universal interest and concern. Eminent domain is the right or power of a sovereign State to appropriate private property * * * The learned attorney for appellant has favored

the court with an exhaustive and earnest argument in his brief, and a painstaking showing is made of the magnitude of the lumbering business and interests of this State, and the effect that it presumably has upon the general prosperity of the Commonwealth; and we are urged to announce a broad and statesmanlike principle in determining this question, and one which would further business prosperity of the State, rather than one which would hamper and retard it. But the court cannot invade the province of the law-making power of government and intrude into its decrees its opinions on questions of public policy. Its duty is to strictly recognize its legal limitations, and confine itself to the narrower duties of interpretation and construction." To the argument that a liberal construction should be given to term "public use," because in the section of the State in which the proposed road is to be built the removal of the standing timber is promotive of the improvement of that section, the answer is that "The Constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform and to constitute a check on the more mutable sentiment and actions of members of different Legislatures. And it seems to us that the result of such construction would be a virtual removal of any constitutional inhibition on legislative power in this respect." *Ibid.* There is a distinction between public policy or public welfare and public use. "It might be of unquestionable public policy and for the best interest of the State to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade and increase property values and thereby increase the revenues of the State, even if the enterprises were purely private, for such is the relation, under our form of government, between public and private prosperity, that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this

was not the kind of public use that was within the minds of the framers of the Constitution, and it seems to us that the logic of those courts which have sustained appellant's contention, is justified solely on the grounds of public policy." *Ibid.* The question is exhaustively discussed in *Bloodworth v. M. & H. R. R. Co.*, 18 Wend., 9; 31 Am. Dec., 311, in which it is said: "When we depart from the natural import of the term 'public use' and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term, public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded and we permit ourselves to be governed by speculations upon the benefits which may result to localities from the use which a man or set of men propose to make of the property of another, we are afloat without any certain principle to guide." *Judge Cooley* says: "It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such case would be the property of him for whom it was established." Const. Lim., 652. To the suggestion that only an easement for the period of five years is imposed upon plaintiff's land and that such period is a reasonable time to remove the timber, we quote the same eminent authority: "And although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what *quantum* of interest would pass from him; it would be sufficient that some interest, the appropriation of which detracted from his right and authority and interfered with his exclusive possession as owner, had been taken against his will; and if taken for a purely private purpose, it would be unlawful." *Ibid.* Again he says: "The

public use implies a possession, occupation of the land by the public at large or by public agencies." *Ibid.*

Without pursuing the subject further, we entertain no doubt that the amendment made to section 2056-2057 of The Code, by chapter 46, Laws of 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional and invalid. This conclusion does not affect the right of condemnation of a cartway as provided by the statute over which all persons may pass, etc. We see no objection to the extension of this privilege to owners of timber lands under the same limitations and conditions as persons settled upon or cultivating lands. It is manifest that the defendants are not seeking this restricted right. They say that it is their purpose to construct the railway for their exclusive use. This concession deprives them of the benefits of the statute, eliminating the amendment of 1887. Counsel call to our attention the decisions of this court sustaining the drainage acts. Without discussing these acts, it is sufficient to say that they expressly confer upon all persons having lands adjoining or capable of drainage through the drains or canals authorized to be opened, the right to avail themselves of these benefits. This distinguishes those statutes from the one under discussion. It is also contended that it is peculiarly the province of the Legislature to say what is a public use, and that its decision may not be reviewed by the courts. While it must be conceded that expressions are to be found in decided cases, several of which are cited by counsel, and in some text books which seem to sustain this contention, it will be found that they are subject to the limitation that the question is primarily one for the Legislature, but its decision is not conclusive, otherwise the Legislature could nullify the principle protecting private property. The correct view is stated by *Judge Cooley:* "The question, what is a public use, is always

one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive." Const. Lim., 660. *Pittsburg, etc., R. Co. v. Iron Works, supra.* "The question, whether a particular use is public or not, is ultimately a question for the courts. This is necessarily true in view of the constitutional provisions of the different States that private property can be taken only for a public use, since the interpretation of constitutional provisions is within the province of the judiciary." 10 A. & E. Enc., (2 Ed.), 1066; *Call v. Wilkesboro,* 115 N. C., 337, in which *Shepherd, C. J.,* says: "Whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary." Citing Lewis on Em. Dom., 185; Mills on Em. Dom., 10-11. The distinction is this—whether a use is public is for the ultimate decision of the courts. If the use is public, the expediency or necessity for establishing it is exclusively for the Legislature. In the discussion of the questions presented, we have assumed that the provisions limiting the power of the Legislature to take private property, were constitutional. As is well known to the profession, no such provision is found in our State Constitution, but since the opinion of *Ruffin, C. J.,* in *Railroad v. Davis,* 19 N. C., 451, the principle has been treated as fundamental and as existing with the same universal application as if imbedded in the Constitution. *Rodman, J.,* in *Johnston v. Rankin,* 70 N. C., 555, says: "The principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." *R. R. Co. v. Platt Land,* 133 N. C., 266. While, as found by His Honor, it is reasonable and even necessary to the successful operation of defendant's enterprise that they carry their timber and timber products over plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weak-

en a fundamental principle upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

The judgment of His Honor continuing the injunction must be

Affirmed.

WALLACE v. McPHERSON.

(Filed October 17, 1905).

Action for Penalty—Abatement by Death—Surety.

Under section 188 of The Code, an action for a penalty, against a Register of Deeds and the surety on his official bond, abates by the death of the officer.

ACTION of State *ex rel* J. M. Wallace against J. A. McPherson and The American Bonding Co., heard by *Judge G. S. Ferguson,* at the May Term, 1905, of the Superior Court of CUMBERLAND County.

This was an action against a Register of Deeds and the Bonding Company as surety, for penalty incurred for issuing a marriage license in violation of secs. 1814-16 of The Code. Subsequent to the institution of the action, the defendant McPherson died. At the next succeeding term, his death being suggested, the court adjudged that the action abate. Plaintiff excepted and appealed.

T. H. Sutton for the plaintiff.
Rose & Rose for the defendant.

CONNOR, J. The only question presented by this appeal is whether, by virtue of section 188 of The Code, the action being for a penalty, abates. The language of the section is plain. "No action shall abate by the death, marriage or other disability of a party, or by transfer of any interest therein, if the cause of action continue or survive. In case of death, except in suits for penalties, and for damages merely vindictive * * * the court, on motion, at any time within one year * * * may allow the action to be continued by or against his representative," etc. If this section stood alone, there would be no question in respect to its construction. The court has no power in actions for penalties to make the personal representative of a deceased defendant a party, and in this condition of the record the action must abate. Such was the rule under common law procedure and Revised Code, chapter 1, section 1, which prevailed prior to the adoption of The Code. *Mason v. Ballew,* 35 N. C., 483; *Fite v. Lander,* 52 N. C., 247.

The plaintiff insists that by virtue of sections 1490-91, the right of action survives and that notwithstanding the language of section 188, the court should have made the administrator a party defendant. There does appear to be some conflict in the two sections. However this may be, the language of section 188 is conclusive upon the power of the court to make the personal representative a party. Whatever may be the right of the plaintiff to bring a new action under the provisions of sections 1490-91, the present action must abate by the express language of section 188. This disposes of the right to prosecute this action against the surety. *Fite v. Lander, supra.*

The judgment must be

Affirmed.

HIGGS v. SPERRY.

(Filed October 17, 1905).

Motion to Dismiss—Duty of Court—Foreign Corporations, Service of Process Upon—Traveling Auditor—Local Agent.

1. Upon a motion to dismiss an action for want of service, the complaint is not properly before the court.

2. Upon a motion to dismiss an action for want of service, the judge should find the facts and not simply find that all of the facts set out in the several affidavits are true.

3. Under section 217 of The Code, a traveling auditor of a foreign corporation, which had ceased to do business in the State, is not an officer upon whom process can be served.

4. A traveling auditor of a foreign corporation, who presented an account to the plaintiff and requested payment to himself, but received no money and presented the account without authority, is not a "local agent" (under section 217 of The Code) for the purpose of service of summons.

ACTION by Sherwood Higgs & Co. against Sperry & Hutchinson Co., heard by *Judge Fred Moore,* at the April Term, 1905, of the Superior Court of WAKE County.

In this action summons was issued March 21, 1905, and returned with the following endorsement thereon: "Received March 22, 1905. Served March 22, 1905, by leaving a copy with E. E. Anthony, Auditor of Sperry & Hutchinson Co.," signed by the sheriff of Guilford County. At the April Term, 1905, of the court, the plaintiffs filed their complaint. At the same term, counsel for defendant entered a special appearance and moved, (1) To set aside the service of summons on E. E. Anthony. (2) To dismiss the action for want of service. The motion was made and heard upon the summons and return thereon and affidavits. Thomas E. Sperry

made an affidavit in which he stated that he was president of the defendant corporation organized and existing under the laws of the State of New Jersy, having its principal office in New York City. That prior to the 20th day of February, 1905, the company had sold and closed out all of its business in North Carolina, and had not, since that day, carried on any business therein. That prior to said day said company discharged all of its employees in said State and closed up its business with the exception of the sum of $175, due to said company from plaintiff. That on the 22nd day of March, 1905, said Anthony was transiently in the State of North Carolina. That prior to said day said Anthony had been engaged in inspecting, adjusting and closing the accounts and books of said company in said State, and prior to said date he had completed said work and reported the conclusion thereof to said company and been ordered to proceed to Baltimore to make an inspection of the books of said company at that point. That said Anthony is one of the traveling auditors of said company and his only duties are to inspect and report to the home office the condition of the books, etc., in the various towns in which said company does business. That it is no part of said Anthony's general duty to collect moneys or to enter into contracts on behalf of said company. E. E. Anthony filed an affidavit substantially of the same import as that of Sperry. He admitted sending a bill to the plaintiffs containing a statement of their account, asking a remittance of the amount due thereon to him at Greensboro, but denied that he had any authority to collect the same. Plaintiff, Sherwood Higgs, filed an affidavit setting forth the receipt of the bill of defendant company on March 19, 1905, with the request that the amount thereof be remitted to said Anthony at Greensboro. That some communication was had with said Anthony over the 'phone, etc. The complaint was also offered as an affidavit. His Honor, upon the hearing, found that the facts set forth in the affidavits of Sperry, An-

thony and Higgs were true. He did not consider the complaint. The motion was granted and plaintiffs duly excepted and appealed.

Robert C. Strong and *C. B. Denson* for the plaintiffs.
Shepherd & Shepherd and *W. H. Pace* for the defendant.

CONNOR, J., after stating the facts: In this court plaintiffs' counsel insisted that His Honor should have considered the complaint upon the motion. While we do not think that the complaint upon motion to dismiss for want of service, is properly before the court, we have examined it and find nothing affecting the merit of the motion to dismiss. It is also insisted that the affidavits of Sperry and Anthony are conflicting. It will be noted that His Honor does not find the facts upon which his judgment dismissing the action is based—he simply finds that all of the facts set out in the several affidavits are true. We are of the opinion that he should have found the facts, which would have been conclusive. If we discovered any substantial contradiction between the several affidavits, it would be our duty to remand the case to the Superior Court for the purpose of finding the facts so that upon appeal we would simply pass upon the question of law presented. While the criticism of plaintiffs' counsel is ingenious we do not think that in so far as the two vital questions—whether the defendant was on the 22nd of March, 1905, doing business in this State or whether Anthony was such an officer or agent of the corporation as contemplated by the statute for the service of summons—are concerned, there is any substantial variance. The criticism that they are not worthy of credit or disingenious, is not open to us. The statute, Code, 217, provides that service of summons may be made upon a corporation by delivering a copy thereof to the president or other head of the corporation, secretary, cashier, treasurer or director, managing or local agent thereof: *Pro-*

vided, That any person receiving or collecting moneys within this State for or on behalf of any corporation of this or any other State or government shall be deemed a local agent for the purpose of service of summons. In respect to a foreign corporation, service can be made only when it has property within this State or the cause of action arose therein, or when the plaintiff resides in this State or when such service can be made within the State personally upon the president, treasurer or secretary thereof. As the defendant company, a foreign corporation, had ceased to do any business in this State on the 22nd of March, 1905, it would seem clear that service could be made only upon the officers named in the statute. We do not think a traveling auditor, such as Anthony was found to be, is such an officer. If he was to be considered as a local agent he expressly denies that he received, or was authorized to collect or receive money for the corporation and His Honor has found this to be true. It is said that if the service be upon any person connected with the corporation who would probably apprise the managing officers of such service, it is sufficient. This suggestion would appeal to the Legislature in providing for service on corporations, but cannot justify us in straining the language of the statute beyond its natural and proper meaning. It is sometimes difficult to define the terms "managing or local agent" as applied to corporations, but in this case it is not claimed that Anthony was a managing agent, and the finding of the judge excludes the idea that he received or collected money. It is true that he presented an account to the plaintiffs and requested payment to himself, but he received no money and says that he presented the account without authority, and His Honor so finds. *Vinard v. White,* 129 N. C., 250, is clearly distinguishable from this case. The person upon whom the service was made was clearly a "managing agent." In *Moore v. Bank,* 92 N. C., 590, the court simply held that an attorney of a foreign corporation was not an agent upon whom process

could be served. *Jester v. Packet Co.*, 131 N. C., 54, held that when the president of such corporation was in the State, service could be made upon him. See Womack's Pr. Corp., 656. The conclusion which we have reached is in harmony with the decisions in New York, where the statute is substantially as ours, as shown by the cases cited in the brief.

The judgment must be

Affirmed.

PEGRAM v. RAILROAD.

(Filed October 17, 1905).

Hearsay Evidence—Conflicting Instructions—Negligence—Employee Rescuing Property of Employer—Obvious Danger—Duty of Employee—Recklessness.

1. A, who had testified about a matter, cannot be corroborated by what B heard another witness say in A's presence about the matter. It is hearsay and incompetent.

2. Where two instructions are conflicting, they must necessarily have confused the jury, and as it is impossible to tell upon which one the jury acted, the appellant has just reason to complain.

3. When the employer's property is set on fire by the negligence of another, the employee may attempt to rescue it, but not in the presence of obvious danger, and if he exposes himself rashly to obvious danger solely to rescue property, he cannot recover if he is injured in his attempt.

4. Proof that the intestate had escaped from a burning building would absolve the defendant from liability for his death, unless the plaintiff replies by showing that his intestate re-entered the burning building for the purpose of saving his employer's property and that at the time he did so a reasonably prudent person might well have done the same thing.

5. An instruction that imposed only one limitation upon the right of an employee to recover his employer's property endangered by fire, viz.: he must not act "recklessly," is erroneous.

PEGRAM *v.* RAILROAD.

ACTION by B. W. Pegram, Administrator of John M. Wilson, against Seaboard Air Line Railway, heard by *Judge Fred Moore* and a jury, at the April Term, 1905, of the Superior Court of WAKE County. From a judgment for the plaintiff, the defendant appealed.

Argo & Shaffer for the plaintiff.
T. B. Womack and *Murray Allen* for the defendant.

BROWN, J. The plaintiff contends that defendant, by means of its engine, negligently set fire to a cotton compress and warehouse at Hamlet, N. C., from which it communicated to the interior of the compress building, and while endeavoring to extinguish the flames the plaintiff's intestate was burned to death, and that defendant is liable therefor. It is further contended that Wilson, the intestate, was an employee of Chas. E. Johnson & Co., lessees of the compress and warehouse, at the time and was endeavoring to save the property of his employer from destruction. There was evidence tending to prove that when the alarm of fire was given, Wilson escaped from the building and went out on the platform, but voluntarily went back into the burning building where he was caught and burned to death. Plaintiff contends he went back for the purpose of saving his employer's property and that it was in the line of duty that he met his death. The court submitted these issues:

1. Was the injury and death of the intestate caused by the negligence of the defendant as alleged in the complaint?

2. Did the intestate by his own negligence contribute to his death?

3. What damage is plaintiff entitled to recover?

The jury answered the first issue "yes," the second issue "no," and assessed the damages.

1. The witness, Gibson, had testified that the fire originated in the bagging on the platform. For the purpose of cor-

roborating Gibson, a witness, Breeden, was permitted to testify that Gibson had repeatedly told him the same thing. On one occasion he testified that one Taylor was present. The witness was asked what Taylor said when Gibson made the statement. The defendant objected, the evidence was admitted and defendant excepted. Witness then testified that Taylor said, "That is right, I saw it when it first blazed up outside." This evidence was not admitted to contradict Taylor, but only to corroborate Gibson. The court so stated. Taylor had been a witness and was asked nothing about it. The defendant excepted, and we are of opinion that the exception is well taken. Gibson cannot be corroborated by what the witness Breeden heard another witness, Taylor, say. Taylor had not been examined on this subject, and the evidence was not offered to contradict Taylor. His unsworn declaration, therefore, delivered by the mouth of another, is not competent for the purpose of corroborating Gibson. It is hearsay. *Merrell v. Whitmire,* 110 N. C., 367. It is simply the unsworn declaration of Taylor as to a past event and was incompetent. *Egerton v. Railroad,* 115 N. C., 645.

2. His Honor gave the following instructions, among others, to the jury: 16. That if the jury shall find from the evidence that Wilson, being in a place of safety, left it and entered the burning building and attempted to extinguish the fire, at the time and in the manner in which an ordinarily prudent person would not have done so, they will answer the second issue "yes." 22. The only limitation of the rule that an employee or servant or other person may incur risk to save property is that one must not recklessly expose himself to danger. Where he does not recklessly expose himself, because of the duty he owes his employer to attempt to save his property, his act is relieved of the character of legal cause, and the liability is remitted to the negligence of the defendant.

These two instructions are conflicting and must necessarily have confused the jury. As it is impossible to tell upon

which one the jury acted, the defendant has just reason to complain. It is very generally held by the courts of this country that where one is exposed to peril by the negligence of another, the latter is liable in damages for injuries received by a third person in a *reasonable* effort to rescue the person imperiled. Considerable divergence, however, exists between the courts as to how far this rule will be extended in an effort to save property endangered by the negligence of another. This question has provoked much judicial discussion. Some jurisdictions deny the right to recover at all, while others have extended the rule so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances. No one, however, should be permitted to recover for injury sustained in attempting to recover mere property in the face of *obvious* danger such as no reasonably prudent man would under the circumstances incur. Sherman and Redfield, vol. 1, paragraphs 85, 87; *Berg v. Great Northern,* 70 Minn., 272; *Lining v. Ill. Central,* 81 Iowa., 246; *Ry. Co. v. Roberts,* 44 Ill., 179. Mr. Watson, in his work on damages for personal injuries, discusses this subject very fully and clearly, and sums up his views in the following language: "The doctrine that a party may recover for personal injuries sustained in a prudent and reasonable endeavor to save or protect his own or another's property threatened with injury by the defendant's negligence, has the support of several well-considered cases, and properly limited, commends itself to the writer's view."

We are willing to hold with many able jurisdictions that when the employer's property is set on fire by the negligence of another, the employee may attempt to rescue it, but not in the presence of obvious danger. If the employee exposes himself rashly to obvious danger solely to rescue property, he cannot recover if he is injured in his attempt. *Power Co. v. Hodges,* 60 L. R. A., 459. It is contended here that the intestate had reached a place of safety; that he had escaped

from the building and from all danger and that his return to the burning buiding was voluntary and unnecessary on his part. If those facts be true, then the plaintiff cannot recover unless he can show that in voluntarily returning into the burning building from which he had safely escaped, his intestate acted with such care and caution as a reasonably prudent man would have exercised under such circumstances. The burden of proof is upon the plaintiff not only to show negligence upon the part of defendant, but that the death of his intestate was proximately caused by such negligence. If it be proven that the intestate had escaped from the burning building and had reached a place of safety, the defendant is absolved from liability for his death, unless the plaintiff replies by showing that intestate re-entered the burning building for the purpose of saving his employer's property and that at the time he did so a reasonably prudent person might well have done the same thing.

In his instruction No. 22, the court below imposed only one limitation upon the right of an employee to recover his employer's property endangered by fire, viz.: he must not act recklessly. Reckless is defined to be "desperately heedless." Century Dictionary. To be reckless is to be regardless of consequences. It is more than carelessness. It implies wilfulness. Any conduct that falls short of recklessness would therefore, in His Honor's opinion, not bar a recovery. We cannot concur in that view. The instruction was erroneous. Had human life been imperiled it is more than doubtful if the instruction would have been warranted *in favorem vitae*, but certainly not in the case of mere property. *Power Co. v. Hodges, supra; Plummer v. Kansas City*, 48 Mo. App., 484; *LaFayette Railroad v. Adams*, 26 Ind., 76. There is nothing in *Burnett v. Railroad*, 132 N. C., 261, relied on by plaintiff, which at all conflicts with the views herein expressed. As the case goes back for a new trial, it is unnecessary to discuss the other exceptions.

Error.

HUDSON v. HODGE.

(Filed October 17, 1905).

Action Before Justice of Peace—Title to Real Estate in Controversy.

In an action for rent begun before a justice of the peace where the defendant denied plaintiff's title and lease, the justice properly dismissed the action.

ACTION by W. L. Hudson against Isham Hodge, heard by *Judge G. S. Ferguson* and a jury, at the March Term, 1905, of the Superior Court of CUMBERLAND County, upon appeal from a justice of the peace. From a judgment for the plaintiff, the defendant appealed.

No counsel for the plaintiff.

N. A. Sinclair for the defendant.

Per curiam: Action for rent begun before a justice of the peace. The defendant denied plaintiff's title and lease, and the justice properly dismissed the action. The Code, sections 836, 837; *Hahn v. Guilford*, 87 N. C., 172. The judge below should have taken the same course. The litigation over the title and tenancy were before us at this term, *Hodge v. Hudson*.

Action Dismissed.

GREEN v. INSURANCE CO.

(Filed October 17, 1905).

Non-residents—Statute of Limitations—Insurance Companies—Cancellation of Policy—Nonsuit—Evidence.

1. Under section 162 of The Code, the statute of limitations does not run in favor of a non-resident, whether it is an individual or a corporation.

2. The statute, which authorizes service of summons against non-resident insurance companies upon the Commissioner of Insurance, does not abrogate or affect the suspension of the running of the statute in such cases.

3. In an action for the wrongful cancellation of an assessment policy, where the plaintiff, becoming alarmed at the defendant's ceasing to write assessment policies and the increasing annual assessments, ceased to pay, and the defendant cancelled his policy, a judgment of nonsuit was proper where the plaintiff failed to show that his assessments were increased by reason of the defendant's ceasing to write assessment insurance, or that he was discriminated against, and there was nothing in the charter or the policy requiring the defendant to continue writing assessment insurance.

4. Where the plaintiff voluntarily ceased payment and abandoned his policy, he cannot ask damages for its cancellation.

5. In an action for the wrongful cancellation of a policy, the motive or the method of reasoning by which the plaintiff arrived at the conclusion to abandon his policy, was irrelevant.

6. In an action for the wrongful cancellation of a policy, a question whether the plaintiff subsequently took out other insurance in lieu of that which he had abandoned, was properly excluded.

ACTION by T. A. Green against the Hartford Life Insurance Co., heard by *Judge W. R. Allen* and a jury, at the February Term, 1905, of the Superior Court of CRAVEN County. From a judgment of nonsuit, the plaintiff appealed.

A. D. Ward, M. DeW. Stevenson and *C. L. Abernethy* for the plaintiff.

John W. Hinsdale and *W. W. Clark* for the defendant.

CLARK, C. J. This is an action for the wrongful cancellation of a policy issued to the plaintiff in 1882 by the defendant upon the assessment plan. The defendant was incorporated in the State of Connecticut and its charter is set out in the complaint. It appears therefrom that the defendant was authorized to issue legal reserve insurance policies as well as accident and assessment insurance, and it was provided therein that the charter migh be repealed or amended at the will of the Legislature. In 1899, the defendant ceased writing assessment policies altogether and restricted itself entirely to old line or legal reserve insurance, leaving the assessment members in a class to themselves, but not sub-dividing them, as in *Strauss v. Insurance Co.*, 126 N. C., 971. The plaintiff became alarmed at the defendant's ceasing to write policies on the assessment plan and the increasing annual assessments, and in 1901 he ceased to pay his assessments, whereupon the defendant declared his policy forfeited.

The defendant's plea of the statute of limitations—that more than three years had elapsed between the time his policy was declared forfeited and the bringing of this action—cannot avail. The statute of limitations does not run in favor of a non-resident, whether it is an individual or a corporation. Code, section 162; *Alpha Mills v. Engine Co.*, 116 N. C., 804; *Grist v. Williams*, 111 N. C., 53. What is said at the conclusion of the opinion in *Williams v. B. & L. Asso.*, 131 N. C., at page 270, is in no wise an intimation that chapter 5, Laws 1901, or chapter 54, section 62 (3), Laws 1899, which authorizes service of summons against non-resident insurance companies upon the Commissioner of Insurance, in any way abrogates or affects the suspension of the running of the statute in such cases. It merely holds that by reason of

those statutes, summons can hereafter be so readily and promptly served that no question as to the bar from the lapse of time is likely to arise—not that it will be a bar, if presented. That service can thus be had upon a non-resident corporation may be a reason why the General Assembly should amend section 162 of The Code, so as to set the statute running in such cases, but it has not done so and the courts cannot.

But we agree with His Honor below in his granting the judgment of nonsuit. The plaintiff failed to show that his assessments were increased by reason of the defendant's ceasing to write assessment insurance or that he was in any wise injured thereby. The charter of the defendant authorized it to issue the different kinds of policy and there is nothing in the charter or in the plaintiff's policy which required the defendant to continue writing assessment insurance, after the company should think it advisable to discontinue that kind of insurance. The annual premiums in assessment companies necessarily grow larger with the age of the assured and the reluctance of young men to come in to prevent by their premiums the increase of rates, which come to an aging and diminishing class. This is the peculiar weakness of that particular kind of insurance. The plaintiff had no right under its contract or under the defendant's charter to require it to continue to struggle for "new blood," as it is called, to keep down his assessments. His reliance must be upon the "safety fund" created out of the excess of premiums, invested for the purpose of making good the payment of policies, which, in a dwindling class, would otherwise require assessments too heavy to be carried solely by the survivors.

In *Wright v. Insurance Co.*, 193 U. S., 657, the court sustained the validity of a statute which authorized assessment companies to convert themselves into old line or legal reserve companies, but, here, the defendant in its original charter had the right to issue either kind of policy, and there was no

provision requiring it to continue to issue both. In *Polk v. Life Asso.*, 137 Fed. Rep., 273, a company which had been purely assessment, changed to old line insurance against the protest of a dissatisfied member, the company keeping up, as in this case, its separate machinery and system for its assessment members. A bill was filed charging insolvency and that the change in its plan of insurance was a violation of the insurance company's contract of insurance. The court dismissed the bill and said that the insured had "no vested right in a continuance of a plan of insurance which experience might demonstrate would result disastrously to the company and its members." Here all the provisions of the original articles for carrying out the contracts between the assessment members and the company are continued unimpaired. The change of business relates only to future contracts to be made thereafter. The defendant had the charter right to issue both assessment and old line policies, and there is nothing in its contracts with assessment members that it shall continue to do that kind of business when experience may have satisfied the company that it was unsafe. In *Strauss v. Insurance Company, supra*, the contract with the plaintiff provided that "assessments should be made upon the entire membership * * * " and the court held that the company violated this when it arbitrarily divided its assessment members into classes, and arbitrarily increased Strauss's assessment when it continued to assess other members of the same age, in other classes, at much lower rates. In this case, there is no evidence that the defendant arbitrarily increased the plaintiff's assessment or discriminated in the amount as between him and other assessment members. There was no contract that only an assessment business would be done, but the plaintiff knew from the defendant's charter that it was authorized to issue both kinds of policy.

The plaintiff voluntarily ceased payment and abandoned his policy. He cannot now be heard to ask damages for its

cancellation. *Insurance Co. v. Phinney,* 178 U. S., 327; *Ins. Co. v. Sears, Ibid.,* 345; *Ryan v. Ins. Co.,* 96 Fed. Rep., 796.

In every case where damages have been allowed for the cancellation of a policy of insurance, it was alleged and proved that the cancellation was wrongful. *Braswell v. Ins. Co.,* 75 N. C., 8; *Lovick v. Life Asso.,* 110 N. C., 93; *Burrus v. Ins. Co.,* 124 N. C., 9; *Hollowell v. Insurance Co.,* 126 N. C., 398; *Strauss v. Life Asso., Ibid.,* 971; *Simmons v. Life Asso.,* 128 N. C., 469.

The exceptions to evidence are without merit. The plaintiff had already stated that he had ceased to pay because he "saw he could not keep up," and when again asked why he had written the company discontinuing his policy, the court correctly held that the witness might state any facts connected with the matter. His motive, or the method of reasoning by which he arrived at his conclusion to abandon his policy, was irrelevant, as was also the other excluded question, whether the plaintiff subsequently took out other insurance in lieu of this which he had abandoned. The answer, whether it had been "yes" or "no," could have thrown no possible light upon this controversy.

No Error.

SMITH v. PROCTOR.

(Filed October 17, 1905).

Deeds—Indefiniteness of Description—"Heirs"—Trust Estates—Rule in Shelley's Case—Tax Title—Color of Title—Adverse Possession.

1. A deed conveying "a certain portion of land, adjoining the lands formerly belonging to B and others, on both sides of the road leading to N——, to contain forty acres to be taken from the tract where G now resides," is void for vagueness and indefiniteness.

2. Prior to the Act of 1879 (section 1280 of The Code), the word "heirs" was generally held necessary to create a fee in deeds conveying the legal title, but it was not so in devises nor in equitable estates, where it was generally held that an estate of inheritance would pass without the word "heirs," if such was the clear intent of the parties.

3. Whenever the word "heirs" appears in an instrument as qualifying the interest of the grantee and indicative of his estate, whether in the premises, the *habendum* or the warranty, same will be transposed and inserted in that portion of the deed which will cause the same to operate as a conveyance of a fee simple interest, when such was the purpose of the grantor.

3½. A deed conveying the legal estate, without the word "heirs" will be held to convey an estate of inheritance if the same on its face contains conclusive, intrinsic evidence that a fee simple was intended to pass and that the word "heirs" was omitted by mistake.

4. A trustee will take by implication of law a fee in the estate when the duties of the trust require it, although the conveyance is in terms of life estate or fails to use the word "heirs."

5. Where a deed conveyed a tract of land to a trustee and his survivors, in trust for H during his life, and in the event of H not leaving lawful issue, the trustee to convey to the heirs of G, but in case of lawful issue of H, then the trustee to make title to heir of H, the entire estate passed, the trustee holding for H during his life and then in trust to convey the land to the lawful children of H, and the exigencies of the trust having terminated on the death of H leaving children, the statute will execute the unnecessary portion of the estate.

6. Where the words "heir of H" in the deed is clearly not intended to denote the whole line of heirs to take in succession as said heirs from "generation to generation," but is simply only a *designatio personae,* meaning lawful child or children of H who may be living at his death, the Rule in Shelley's Case does not apply.

7. A sale and conveyance by the sheriff under the Revenue Act of 1874-5, of the lands of a life tenant for default in payment of taxes on his part, does not operate to convey the interest of the remaindermen.

8. A tax title which conveys only the interest of the life tenant, is not color of title against the remaindermen, nor is possession thereunder adverse until the death of the life tenant.

9. Color of title is a paper writing which professes and appears to pass the title, but fails to do so.

10. Adverse possession, which will ripen a defective title, must be of a character to subject the occupant to action.

ACTION by Mattie Lee Smith and others against Nancy Proctor and others, heard by *Judge W. R. Allen* upon an agreed statement of facts, at the June (Special) Term, 1905, of the Superior Court of NASH County.

The facts pertinent to the questions involved are as follows: In 1867 Isaac Sessums, being seized and possessed of an undivided tract of land in Nash County, containing 150 acres, undertook to convey same to B. H. Sorsby, Sr., trustee, by two deeds, for the purposes therein set forth; the first deed in the portion material to the controversy being as follows: "This indenture, made and entered into this 2nd day of July, 1867, between Isaac Sessums, of the county of Nash, and State of North Carolina, of one part, and B. H. Sorsby, Sr., trustee, and his survivors, of the second part: Witnesseth, that for and in consideration of the sum of one dollar to me in hand paid by the said trustee, the receipt whereof is hereby fully acknowledged, have bargained, sold and conveyed to the said trustee and his survivors, a certain portion of land lying and being in the county of Nash, adjoining

the lands formerly belonging to Elias Barrett and others, on both sides of the road leading to Nashville, to contain forty acres to be taken from the tract where Thursby Griffin now resides, for the following purposes, to-wit: That said trustee and his survivors are required to hold in trust for the benefit of Nancy Hunt, during the term of her natural life, and after the death of said Nancy, to convey the same to the lawful heirs of Isaac T. Hunt, then to the lawful heirs of Thursby Griffin, wife of Benjamin Griffin. In witness whereof I have hereunto set my hand and seal the day and date above written. ISAAC SESSUMS. (Seal)."

Witness, John H. Sharp.

The second deed was as follows: "This indenture made and entered into the second day of July, 1867, between Isaac Sessums, of the county of Nash and State of North Carolina, of the one part, and B. H. Sorsby, Sr., trustee, or his survivors, of the second part: Witnesseth, that for and in consideration of the sum of one dollar to me in hand paid by said trustee, the receipt whereof is hereby fully acknowledged, have this day bargained, sold and conveyed unto him, the said trustee and his survivors, one certain tract or parcel of land lying and being in Nash County, containing 110 acres, more or less, adjoining the lands of Jordan Brewer, the heirs of Henderson Ellen and others, and known as the place where Thomas Hunt formerly resided, for the following purpose, to-wit: That is to say that the said trustee, or his survivors, shall hold in trust the above tract of land for the benefit of Isaac T. Hunt, during his natural life, and in the event of the said Isaac T. Hunt not leaving lawful issue, I hereby empower the said trustee to make * * * of the above deeded premises to the heirs of Thursby Griffin, wife of Benjamin Griffin, but in case of lawful issue of Isaac T. Hunt, then, and in that case, the said trustee is hereby empowered to make title to the heir of the said Isaac T. Hunt, and also

in further consideration of one dollar in hand paid to me by said trustee, I have bargained, sold and conveyed to him, one mouse-colored mule for the purposes above stated in regard to the disposition of the land, etc. In witness whereof, I have hereunto set my hand and seal," etc.

ISAAC SESSUMS. (Seal)."

Witness, etc.

3. That in the year 1876, George N. Lewis, sheriff of Nash County, sold said land for taxes due thereon for years 1874-'75-'76, and conveyed same to one John Killibrew, reciting sale for taxes, and that owner had failed to redeem, etc.

4. That on the 31st day of January, 1884, said John J. Killibrew conveyed said land by quitclaim deed for valuable consideration to one Isaac Proctor. This deed contained a note saying that the land formerly belonged to Isaac Hunt, and was sold by G. N. Lewis for default in payment of taxes on April 3, 1876.

5. That Isaac T. Hunt, referred to in the deeds of Isaac Sessums, died on the 14th day of February, 1903, and plaintiffs are his children and heirs at law, and were born after the year 1884.

This suit was instituted by the plaintiffs on the 18th day of August, 1903.

6. That prior to twenty-five years ago, B. H. Sorsby, named as trustee in both deeds from Sessums, died, and no other trustee has been appointed by the court, or agreed upon by the parties as to the trusts raised in said deeds.

7. That defendants are the widow and heirs at law of the said Isaac Proctor, grantee in the deed from Killibrew, that he died intestate in November, 1894, and defendants and those under whom they claim have been in the exclusive possession of said tract of land, under, and ever since the date of the deed from John J. Killibrew, dated January 31, 1884, claiming it as their own, and exercising the right of ownership over it, etc.

On the facts set out in the case agreed, the judge below was of opinion that plaintiffs could not recover, gave judgment to that effect, and plaintiffs excepted and appealed.

B. H. Bunn and *F. S. Spruill* for the plaintiffs.
Battle & Cooley for the defendants.

HOKE, J., after stating the facts: The two deeds from Isaac Sessums to the trustee were evidently executed with the design and purpose of conveying the entire tract of 150 acres. The case agreed, in effect, so states.

The second deed, however, is sufficiently definite and comprehensive under certain circumstances to embrace the entire tract of land "known as the place where Thomas Hunt formerly resided," giving also the county and adjoining lands. And if, as defendants contend, the first deed which was made in the effort to cut off forty acres from the land, is void because too vague and indefinite in the description to pass any land, then the second would pass the entire tract.

The court is of opinion that the position of defendants in regard to the first deed from Isaac Sessums set out in the case agreed, is well taken, and the same is void because too vague and indefinite to pass any land. It purports to cut off forty acres from the main body of the land and does not in any way indicate the shape or give any data by which the divisional line can be located. *Robeson v. Lewis*, 64 N. C., 737; *Perry v. Scott*, 109 N. C., 379-380. The deed is therefore void, and the rights of the parties depend on the true construction of the second deed, and the other facts set out in the case agreed.

On this second deed the defendants contend: First, That as same bears date prior to Act of 1879, Code 1883, sec. 1280, the word "heirs" is absolutely necessary to convey a fee. That said word not being in the deed in connection with the trustee's estate, he only took a life estate; that this life

estate terminated by his death twenty-five years ago, and at his death the land reverted to the grantor, or his heirs.

It is true that prior to the Act of 1879 the word "heirs" was generally held necessary to the creation of a fee simple estate in deeds conveying the legal title. It was not so in devises nor in equitable estates, where it was generally held that an estate of inheritance would pass without the word "heirs" if such was the clear intent of the parties. *Holmes v. Holmes,* 86 N. C., 205-207.

A series of decisions have also established the proposition that whenever the word "heirs" appeared in an instrument as qualifying the interest of the grantee and indicative of his estate, whether in the premises, the *habendum* or the warranty, same would be transposed and inserted in that portion of the deed which would cause same to operate as a conveyance of a fee simple interest, when such was the purpose of the grantors. And in *Vickers v. Leigh,* 104 N. C., 248, it was decided that in a deed conveying the legal estate, although the word "heirs" did not appear, the deed would be held to convey an estate of inheritance if the same on its face, contained conclusive, intrinsic evidence that a fee simple estate was intended to pass and that the word "heirs" was omitted from the instrument by ignorance, inadvertence or mistake. This case has since been uniformly upheld and acted on by this court, where the evidence of intent to convey a fee simple was of this character, and appeared so clearly from the face of the instrument that the court could see that the words of inheritance were omitted by mistake. The decisions since this opinion was rendered, which are apparently to the contrary, are cases where the evidence of the mistake could not be drawn exclusively from the instrument itself, but required the aid of facts *dehors* the instrument and the interposition of the equitable powers of the court on allegations of mistake duly made. This case of *Vickers v. Leigh* is cited and

affirmed in *Fullbright v. Yoder,* 113 N. C., 456; *Moore v. Quince,* 109 N. C., 89; *Helms v. Austin,* 116 N. C., 751.

In *Helms v. Austin* the position is taken as accepted doctrine, and in *Moore v. Quince, supra,* was applied to the estate of the trustee as in the case we are now considering. In the deed before us we are of opinion that it was the clear intent of the grantor to pass a fee simple interest in both the legal and equitable estates, the two uniting when the exigency of the trust had terminated. Another principle may be properly invoked to uphold the estate of the trustee. In Am. & Eng. Enc. (2 Ed.), vol. 28, p. 923, it is said: "If there is an axiom of the law it must be regarded as axiomatic in the construction of active trusts that the trustee will take precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of the trust. Thus the trustee will take, by implication of law, a fee in the estate when the duties of the trust require it, although the conveyance is in terms of life estate or fails to use the word heirs." In the same volume, at page 924, it is also said: "The estate of trustee will, nevertheless, not extend beyond the term required by the exigiencies of the trust, the unnecessary portions of the estate becoming executed by the statute of uses." The authorities clearly show this to be a correct statement of the doctrine. *North v. Philhook,* 34 Me., 532; 1 Lewin on Trustees, pp. 213, 214.

"If land," said *Lord Hardwick,* "be devised to a man without the word 'heirs' and a trust be declared which can be satisfied in no otherwise but by the trustee taking an inheritance, it has been construed that a fee passes. Thus a trust to sell, even on a contingency, confers a fee simple as indispensably necessary to the execution of the trust." And it is familiar doctrine that a trust shall not fail for the want of a trustee. *Moore v. Quince, supra.*

These deeds from Isaac Sessums were evidently executed as a scheme for the settlement of the property in which the

present plaintiffs, as children of Isaac T. Hunt, were the principal and ultimate beneficiaries of the grantor's bounty. The general purposes of the deed, the terms in which the estate is declared and the general context, conclusively show that it was the intent of the grantor to pass the absolute ownership of the property, and that the trustee is given an estate commensurate with the exigencies of the trust.

The defendants further contend that under the Rule in Shelley's Case, Isaac T. Hunt took an estate in fee simple under the deed from Isaac Sessums, the deduction being that he being the owner of the land in fee, the sheriff's deed for taxes would convey a like estate to John Killibrew, the purchaser of the tax title, under whom defendants claim. But the Rule in Shelley's Case does not apply to the deed we are here construing.

A very clear statement of the rule and certain recognized exceptions to it will be found in the case of *Ware v. Richardson,* 3 Md., 505, as follows: "In Shelley's Case, 1 Coke, 104, the rule was laid down on the authority of a number of cases from the Year Books, to be that when the ancestor, by any gift or conveyance, taketh an estate of freehold and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase * * *" *Chancellor Kent,* however, adopts the following definition of the rule by Mr. Preston, as being more full and accurate: "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 1 Preston on Estates, 263.

"In cases, therefore, where the word 'heirs' or 'heirs of the body' are used, they will be construed to limit or define the estate intended to be conveyed, and will not be treated as words of purchase, and no supposed intention on the part of the testator or grantor arising from the estate being conveyed, in the first instance, for life, will be permitted to control their operation as words of limitation. In all such cases the estate becomes immediately executed in the ancestor, who becomes seized of an estate of inheritance. By force of the unbending construction given to these terms, it imputed to the grantor or testator, in legal contemplation, an intention to use the terms in their legal sense and to give them their legal effect, though it should defeat even the real intention to the contrary. In other words, they are regarded as conclusive evidence of the intent of the testator."

"There are, however, well recognized exceptions to this rule, two of which we will advert to at present in general terms: In the first place, whenever the testator or grantor annexes words of explanation to the word 'heirs,' indicating that he meant to use the term in a qualified sense, as a mere *descriptio personarum* or particular description of certain individuals, and that they, and not the ancestor, were to be the points of *termini* from which the succession to the estate was to emanate or take its start, then in all such cases where the word 'heir' is thus explained or restricted, it is to be treated as a term of purchase, and not of limitation. For example, the expressions 'heirs now living,' 'children,' 'issue,' etc., are words of limitation or purchase as will best accord with the manifest intention of him who employs them. Under this qualification of the rule, the intention prevails against the strict construction."

"The second exception to which we will advert is, that where the estate limited to the ancestor is an equitable or trust estate, the two estates, under the Rule in Shelley's Case, will not coalesce in the ancestor, and the result would be the same

if the estate for life was a legal estate, and that limited to the heirs an equitable estate. *Horne v. Lyeth,* 4 Har. & J., 432."

The deed before us is within the first exception so clearly stated. In the terms of this deed, descriptive of the estate, "the said trustee or his survivors, shall hold in trust the above tract of land for the benefit of the said Isaac T. Hunt during his natural life * * * and in the event of Isaac T. Hunt not leaving lawful issue, I hereby empower the said trustee to convey to the heirs of Thursby Griffin, but in case of lawful issue of Isaac T. Hunt then, in that case, the trustee is hereby empowered to make title to the heir of Isaac T. Hunt."

The words "heir of Isaac T. Hunt," is clearly not intended to denote the whole line of heirs to take in succession as said heirs, "from generation to generation," in the language of Preston's statement of the rule, but is simply only a *designatio personae,* meaning lawful child or children of Isaac Hunt, who may be living at his death. Said Hunt having died leaving lawful children, who are the plaintiffs, we hold the proper construction of the deed as to the interest conveyed to be: That the trustee hold in trust for Isaac T. Hunt for his life, that after his death, the trustee shall convey the land to the lawful children of Isaac T. Hunt, and the exigencies of the trust having terminated on the death of Isaac T. Hunt leaving lawful children, the statute will execute the unnecessary portion of the estate. The sale and conveyance, therefore, of the land by the sheriff for default in payment of taxes on the part of Isaac T. Hunt—the land having evidently been listed as the land of Isaac T. Hunt—did not operate to convey the interest of his children, who take in remainder as purchasers. *Tucker v. Tucker,* 108 N. C., 236, citing *Macay, ex parte,* 84 N. C., 63. This sale was under the statutes of 1874 and 1875, which speak throughout of the sale of delinquent's interest, the one who had listed the property and failed to pay. And moreover, in the Revenue Law for that

year, Acts of 1874-5, ch. 184, sec. 29, subsec. 3, is the provision: "And it is expressly declared that the lands of a minor, lunatic or a person *non compos mentis* shall in no case be taken to be sold for taxes."

It may be well to note that this sale for non-payment of taxes took place under the provisions of the Act of 1874-5. Under the Act of 1887 and the Revenue Acts since that time, so far as we have examined, the State has adopted a different and more stringent method of enforcing the collection of taxes. When the taxes are due and the requirements of the statute otherwise complied with, a sale now conveys the property, and not simply the interest of the delinquent. The statute protects the interests of minors and remaindermen, by making specific provision as to their right to redeem. We have here only construed the revenue laws of 1874-5, these being the statutes governing the rights of the parties in the present case.

The defendants further contend that if the tax deed does not convey to them the rights of the plaintiffs, it is good as color of title, and the defendants and those under whom they claim having occupied the land since the date of this deed in 1884, asserting ownership, they are protected by the statute of limitation. This position cannot avail the defendants. In the first place, while the tax deed does not operate to convey the interest of the plaintiffs, it does convey the interest of Isaac T. Hunt, the life tenant. The very definition of color of title is a paper writing (usually a deed) which professes and appears to pass the title, but fails to do so. In Words and Phrases Judicially Defined, vol. 2, p. 1264, it is said to be, "That which in appearance is title, but which in reality is no title"—citing many decisions. And for the same reason, the possession of the defendants was not adverse. The tax deed under which they occupied the land passed to them the interest of the life tenant. Adverse possession,

which will ripen a defective title, must be of a character to subject the occupant to action.

If the trustee or these plaintiffs had sued during the life of Isaac T. Hunt, their action would have failed, because the defendants, under their tax deed, held the interest of the life tenant in the property. Their occupation then was neither adverse nor under color of title till the death of the life tenant, which occurred only a short time before the institution of the present suit. And herein lies the distinction between this case and *King v. Rhew,* 108 N. C., 698, cited by defendants. In *King v. Rhew* the estate was conveyed to a trustee in trust for the sole and separate use of Charlotte King (*feme covert*) during her natural life, and after her death to be equally divided between any children she may leave her surviving, etc. Isaac King and wife, in August, 1869, undertook to convey the estate, and by *mesne* conveyances the land passed to the defendant, who occupied and claimed to own the same under his deeds till 1889, when suit was brought. Charlotte King died on September 20, 1889, and the plaintiffs, her only surviving children, instituted the action to recover the land. The deed by which Charlotte King and her husband endeavored to convey the land, was void, and passed no estate or interest of Charlotte King, the life tenant. The court held that the estate of the trustee was barred, and for that reason the children, the *cestuis que trust*, were also barred. That was because the deed of the life tenant being void, the attempted occupation under it was, from the beginning, hostile to the title of the trustee, subjecting the occupant to an action by him from the date of the deed.

In our case, the tax title passed the interest of the life tenant, and the trustee, as stated, could not have successfully maintained his action till the life estate terminated.

Our conclusion on the whole matter is that the deed from Isaac T. Sessums passed the entire estate in the land, the trustee holding for the benefit of Isaac T. Hunt, during his

life, and then in trust to convey the same in fee to his lawful children, who have a present right to recover the property.

There was error in the judgment of the court below, and, on the case agreed, judgment will be entered for the plaintiffs.

Reversed.

CHEMICAL CO. v. MCNAIR.

(Filed October 17, 1905).

Contracts—Lien Bonds—Assignment of—Consideration—Notice of Assignment—Following a Fund—Drafts—Trustee.

1. A contract by the defendant to deliver to the plaintiff lien bonds for an amount sufficient to secure the payment of his notes, vests in the plaintiff, as against the defendant, title to five lien bonds actually delivered in pursuant of said contract, though no specific bonds were mentioned and two of those delivered had not been executed at the date of the contract.

2. By the assignment of a lien bond, the assignee acquires right and title to the account for securing the payment of which the bond was given.

3. Indulgence, or extension of time for payment of a debt, constitutes a valuable consideration.

4. Notice to the debtor of the assignment of a non-negotiable instrument is necessary to protect the assignee from the effect of a payment to the original creditor, but such notice is not necessary to the validity of the assignment as between the assignor and assignee.

5. A contract to assign as collateral security "all accounts whatever owing to me as evidenced by my book of accounts," with an agreement "to furnish a full and complete list of said accounts," does not pass accounts not on the list furnished.

6. Where the defendants are fixed with the receipt of the identical money paid on accounts secured by lien bonds which had been assigned to the plaintiff, the plaintiff can recover the amounts thus coming into the defendants' possession.

7. The acceptance of a draft from a debtor does not merge the debt, or operate as a payment unless expressly so understood and agreed.

8. Where C agreed to sell the guano of O and to deliver to O notes of the planters to whom he sold, to be held by O as collateral security, and that all proceeds of guano sold were to be held by C in trust for the payment of his notes, O is entitled to the proceeds of the notes paid to the defendants as against the plaintiff to whom the lien bonds securing said notes were assigned, though the plaintiff had no notice of O's claim.

ACTION by the Virginia-Carolina Chemical Company against John F. McNair and others, heard by *Judge O. H. Allen,* upon the report of the referee, at the May Term, 1905, of the Superior Court of NEW HANOVER County.

C. H. Coble, being indebted to the plaintiff and desiring to obtain an extension of the time of payment, on January 26, 1898, executed his notes to be due on the first day of October and November, 1898, and at the same time, in consideration of the extension given, contracted to deliver to the plaintiff within fifteen days, lien bonds from his customers for an amount sufficient to secure the payment of his notes. No specific bonds were mentioned, and at that time two of those afterwards sent had not been executed. This paper was never registered. On January 30, 1898, the said Coble executed to McNair and Pearsall a contract, reciting an indebtedness evidenced by his promissory note bearing even date therewith of $4,952.25, due on the first day of October, 1898, to secure the payment of which he bargained, sold and assigned to said defendants "all accounts whatever owing to me as evidenced by my book of accounts, or any memoranda whatever kept by me at my store in the town of Laurinburg * * * I also contract to furnish said McNair and Pear-

sall a full and complete list of said accounts and notes." On the same day the said Coble executed to said defendants a mortgage on his stock of goods and a lien upon his crops; also delivered to McNair and Pearsall a list of his accounts, etc., other than the five lien bonds which are the subject of this controversy. The said contract was registered October 3, 1898.

C. H. Coble sold, in 1898, fertilizers as agent for G. Ober & Sons' Co., to the persons executing the lien bonds delivered to the plaintiff, and collected on account thereof, the sum of $231. Coble collected from the persons executing the five lien bonds delivered to the plaintiff company, and on account thereof, including the amount collected for the guano prior to October 1, 1898, $257.75, which he turned over to the defendants and subsequently thereto the said defendants collected from said persons and on account thereof, $556.99. That plaintiff had no notice of the claim of G. Ober & Sons' Co., or any other person. C. H. Coble died since the beginning of this action, and his administrator was made party defendant. The debts due the plaintiff and G. Ober & Sons' Co. are unpaid, and there is a balance due the defendants from said Coble. The plaintiff demanded of the defendants payment of the amounts received by them, which was refused. "In October, 1898, the plaintiff, by its authorized agent, A. H. Adams, obtained from Coble an accepted draft on McNair and Pearsall for $257.75, the amount collected by them, which draft recited that it was to be paid by McNair and Pearsall, out of such excess as might remain in their hands after the debt to themselves had been satisfied—but the agent Adams, after offering to return the draft and being refused, tore up the draft." This action is prosecuted by the plaintiff against McNair and Pearsall and the administrator of Coble, for the purpose of establishing its debt against the estate of Coble, and recovering from the other defendants the amount collected by them on account of the lien bonds.

Pending the suit, G. Ober & Sons' Co. intervened and were duly made parties for the purpose of asserting their claim to the $231 collected by defendants. The cause was referred to Hon. Alfred M. Waddell, who made his report, to which the plaintiff filed exceptions. The cause was heard by His Honor, *O. H. Allen,* when the exceptions were sustained and the report modified in respect to the facts and conclusions of law.

Judgment being rendered for the plaintiff, the defendants, McNair and Pearsall, and the intervenors, G. Ober & Sons' Co., excepted and appealed.

Rountree & Carr and *M. L. John* for the plaintiff.
E. K. Bryan for the defendants and the intervenors.

CONNOR, J., after stating the facts: The record contains quite a number of assignments of error pointing to the conclusions of fact found by the judge; defendant contending that there is no evidence to sustain such conclusions. We have examined the evidence and, in our opinion, the exceptions in this respect cannot be sustained. In regard to the conclusion reached by His Honor that the five lien bonds in controversy were not included in the list furnished by Coble to defendants, the burden of proof was upon them; it is therefore not open to them to raise the question that there was no evidence in regard thereto. If the plaintiff acquired the title to the bonds as against Coble by the contract of January 26, 1898, and the subsequent delivery, the defendants could invalidate the right to them only by showing a superior title in themselves. The first step in making good this claim, was to show that they had been assigned to them. The failure to do so changed the basis of the contest, and left open to the defendants the right to attack the plaintiff's title by showing such infirmity as to invalidate it without regard to any claim of their own. To do this they make certain well defined con-

tentions which we will discuss in the order presented by the brief of their counsel. It is first said that nothing passed by the contract of January 26, 1898, because no specific lien bonds were mentioned; that two of those afterwards delivered had not at that time been executed. However this may be, the conclusion of fact found by the judge, that the five bonds described in the complaint, were sometime during the month of February, 1898, delivered to the plaintiff in pursuance of the contract of January 26, 1898, removes or cures any defect in the plaintiff's title by reason of the failure to name or specify the bonds in the contract. The defendants rely upon *Blakeley v. Patrick,* 67 N. C., 40, wherein it is held that the description in a mortgage of "ten new buggies," the mortgagor having a larger number of new buggies on hand, was too indefinite, and the mortgagee acquired no title to any buggies. It is clear that, if before the right of third parties attached, the mortgagor had set apart ten new buggies and delivered them into the possession of the mortgagor in pursuance of the mortgage, he could have retained them. It may be that his right could have been sustained, either as curing a defect in the writing, by rendering certain that which was uncertain, or by treating the delivery as a pledge, resorting to the mortgage to fix the terms and purpose for which it was made. In our case we do not think that the plaintiff acquired even, as against Coble, any right to demand specific performance, by compelling the delivery of any specific lien bonds, but where the five bonds were, as found by His Honor, in pursuance of such contract, actually delivered, the right to retain possession, for the purpose and upon the terms set forth in the contract, was perfected. The defendants contend that conceding this to be so, the plaintiff acquired no right or title to, or claim upon the accounts for securing the payment of which the bonds were given. It is undoubtedly true, as contended and as shown by the authorities cited, that "In general, in an assignment of the mortgage without any transfer

of the note, bond or debt secured thereby, the assignee takes only the legal estate, which he will hold in trust for the owner of the note or other mortgage debt." This proposition does not, however, aid us in the decision of the question presented here. There was not, at the time of the execution of the lien bond nor of the delivery to plaintiff, any note, bond or account in existence to be assigned or delivered. The lien bond was executed to secure an account for advancements thereafter to be made to aid in the cultivation of a crop for the current year. Those instruments generally used by merchants and farmers in this State, are peculiar and unlike, save by analogy, any other form of contract. They had their origin in the conditions existing in this State, by reason of the changed method of cultivating lands, after the late civil war and were first authorized by the Act of 1866-7. Code, sec. 1799. It has been found difficult to apply to them, in many respects, the principles by which the rights of parties, by assignment or otherwise, are governed by the law of negotiable instruments and mortgages securing existing debts. While they are executed only by the party to whom the advancements are to be made, they have many of the attributes of a bilateral contract. The value of the security is largely, and often entirely, dependent upon the performance of the agreement of the party who is to make such advancements. The entire contract is set forth in one paper—there is no existing debt as in the ordinary mortgage to which the security is but the incident. When assigned for any purpose they are of no value to the assignee if the account as it accrues, by reason of the advancement of supplies, does not enure to his benefit. The assignability of all choses in action, or other contractual rights has in recent years, by statutes and decisions of the courts, been very much enlarged. There can be no question that a contract for money to become due in the future, may be assigned, and that when the money is due, the assignee may sue for and recover it in his own name, subject

to such defenses as the debtor may be entitled to make, as the real party in interest. We can perceive no reason why the lien bond with all rights, then existing, or thereafter, in pursuance and execution of its terms accruing, may not be assigned. In ascertaining what passes by the assignment, the intention of the parties will control. "To ascertain the intention of the assignor and assignee as to what interests, rights or property they intended should pass under the assignment and to carry out such intention as nearly as may be done without violence to the language used by them, is, as in the case of all other contracts, a cardinal rule." 4 Cyc., 73; *Pass v. McRoe,* 35 Miss., 143.

"When a mortgage was transferred pursuant to an agreement as security for a debt, but there was no assignment of the mortgage debt, it was held that if essential to give effect to the assignment, the assignee might be regarded as having an interest in the debt for which both the note and mortgage were securities; and that the legal effect of the transaction was to transfer to the assignee the property embraced in the mortgage as security for his advance." Jon. Chal. Mort., 505.

The rule is well stated by *Andrews, J.,* in *Campbell v. Birch,* 60 N. Y., 214, in discussing the question presented upon this appeal. He says: "It is a general principle applicable to the construction of grants or contracts that they should be construed so as to give them effect according to the intention of the parties. When a thing is granted, everything possessed by the grantor, passes as incident which is necessary to make the grant effectual." In that case the note was retained by the mortgagee; the court held that it passed to the assignee of the mortgagee. It is also said: "It should be mentioned, as a qualification to the rule requiring the transfer of the debt along with the assignment of the mortgage, that when a mortgage has been made and no separate obligation has been given for the payment of the money secured by

the mortgage, an assignment necessarily transfers all the rights and interests under it." 2 Am. & Eng. Enc. (2nd Ed.), 1086. The case before us comes clearly within the qualification. To hold otherwise would defeat the manifest intention of the parties and attribute to them a purpose to do a vain thing, under the form of a well considered business transaction. If Coble only intended by delivering the lien bonds, to pass them and retain the accounts to accrue, which alone made them valuable, he was keeping his promise to the ear and breaking it to the sense. Courts should endeavor to so construe the conduct and language of men as to carry out in good faith their honest purposes. The suggestion that the contract and delivery of the lien bonds was not supported by a valuable consideration, was not pressed here. It is elementary learning that indulgence or extension of time for payment of a debt constitutes a valuable consideration; applications of the principle are found in numerous cases in the reports. Notice to the debtor of the assignment of a non-negotiable instrument is necessary to protect the assignee from the effect of a payment to the original creditor, but such notice is not necessary to the validity of the assignment as between the assignor and assignee. 4 Cyc., 32; *Ponton v. Griffin*, 72 N. C., 362.

For the reasons set forth we are of the opinion that, as against Coble, the plaintiff became the owner of the five lien bonds and of the accounts as they accrued, for the security of which they were executed. The finding of His Honor that they were not included in the list of accounts furnished by Coble, to defendants McNair and Pearsall, relieves us of the necessity of considering several of the questions discussed in the argument. We have examined the contract made by Coble with the defendants, of January 30, 1898, to ascertain whether the accounts passed independently of the list furnished "for identification." The description of the choses in action assigned by the contract is "all accounts whatever

owing to me as evidenced by my book of accounts." If the defendants were compelled to rely upon this language as the basis of their right, it is exceedingly doubtful whether any accounts contracted subsequent to January 30, 1898, passed. With the aid of the list furnished, it is probable that the intention to pass the accounts named therein would be ascertained—to include those made after the date of the contract. This is immaterial here because of the finding that the ones in controversy were not on the list.

The defendants' counsel say, that conceding this to be true, the plaintiff cannot recover in this action unless it shows that Coble paid to them the identical money received by him from the parties owing the accounts. This is true, but the finding of fact is that Coble "collected on the five lien bonds claimed by the plaintiff, the sum of $257.75 prior to the 3rd day of October, 1898, and turned it over to McNair and Pearsall, and that subsequently thereto defendants McNair and Pearsall, collected on said lien bonds the sum of $556.99." This finding fixes the defendants with the receipt of the identical money paid on the accounts secured by the lien bonds. We can see no reason why the plaintiff may not recover the amounts thus coming into their possession. It is insisted, however, that by the acceptance of the draft by plaintiff's agent, drawn by Coble upon the defendants for $257.75, to be paid out of any balance remaining in their hands after the payment of their debt, released the defendants from any claim on account of the receipt of the money. It is well settled that unless expressly so understood and agreed, the acceptance of a draft from a debtor does not merge the debt, or operate as a payment. *Wilson v. Jennings*, 15 N. C., 90; *Mauney v. Coit*, 80 N. C., 300. The parties did not, by reason of the acceptance of the draft, in any respect change their status, or surrender any rights as between each other. We can see no reason why upon surrendering, or what was equivalent, destruction of the draft, the plaintiff may not sue upon the original

cause of action. We concur with His Honor in this respect. This disposes of the exceptions of the defendants. The judgment in that respect must be affirmed. The other branch of the case is presented by the exception of the intervenor, G. Ober & Sons' Co. His Honor was of the opinion that as the plaintiff had no notice of their claim to the proceeds of the guano sold by Coble, they were not affected thereby. We cannot concur in that opinion. It appears from an inspection of the contract made by Coble with Ober & Sons' Co., bearing date January 17, 1898, that he was to sell the guano, and deliver to Ober & Sons' Co., notes of the planters to whom he sold, to be held by them as collateral security, and that all proceeds of guano sold, were to be held in trust by Coble for the payment of his notes. As between Coble and Ober, there can be no question that the accounts were held as the property of the latter, and the money collected thereon was held in trust for them. Contracts containing the same language in respect to the terms upon which the guano was to be sold and the proceeds held, were construed by this court in *Chemical Co. v. Johnson,* 98 N. C., 123, and *Guano Co. v. Bryan,* 118 N. C., 576. In the last case, *Mr. Justice Montgomery* said: "There can be no doubt that the contract makes the defendant a trustee for the plaintiff's benefit of the guano sold to him by the plaintiff, of the notes taken by the defendant from the purchasers of the guano and of the cash money derived from the sales and of that collected on the notes." The right which the plaintiff acquired by the contract, etc., was to have the amount due, or to become due to Coble, for his own property sold to his customers, not for the amount due him for the property of some other person, or which he held in trust for some other person. It will be observed that the contract with Ober was made January 17, 1898, some nine days prior to the contract with the plaintiff. There is no uncertainty as to what were Ober's rights under that contract. The accounts accruing for the sale of the guano were their property, and

the proceeds, when collected, were in the possession of Coble, in trust for him. The plaintiff was not a purchaser for value or otherwise of Ober's property. The question of notice does not arise—it is one of title to the property. The same process of reasoning, and an application of the same principles which entitles the plaintiff to recover the amount which went into the possession of the defendants from the account due for Coble's goods, entitle the intervenors to recover the amount representing their guano. This is not a case of conflicting equities, but of following the funds belonging to the parties. There is nothing in the testimony or the findings to show that defendants McNair and Pearsall parted with anything of value for the amounts turned over to them, or collected by them. They simply applied it to the indebtedness of Coble by mistake, supposing that it was his money, whereas, in fact, it was the money of the plaintiff and G. Ober & Sons' Co. They will pay it to the parties entitled and charge it back to Coble, leaving his indebtedness as it would have been if he had not erroneously turned it over to the wrong parties. It is manifest that all parties were acting in good faith, supposing that there would be enough to pay all of them—in this they seem to have been mistaken. We can see no reason why the intervenors should not recover the full amount collected by Coble from the sales of their guano, which is found to be $231.

The judgment of His Honor must be modified that the plaintiff recover of defendants the amount found to have been received by them, less $231, for which the intervenors will have judgment. The costs of this court will be divided between the plaintiff and defendants. We can see no reason why plaintiff may not recover judgment for their debt against the administrator of Coble, subject to a deduction of the amount recovered of defendants McNair and Pearsall.

The judgment is

Modified and Affirmed.

HICKS v. KENAN.

(Filed October 17, 1905).

MOTION TO AFFIRM.

Motion to Dismiss Appeal—Assignment of Errors—Exceptions.

1. Section 550 of The Code and Rule 27 of this court require an assignment of the errors relied on to be tabulated and inserted in the case on appeal or record, preferably at the end.

2. Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent.

ON THE MERITS.

Contract—Principal and Agent—Personal Liability of Agent.

1. Where a contract which was intended to be a satisfaction of all notes, drafts and accounts of plaintiff's creditors, was signed by defendant's intestate "representing A," who did not hold any such claim, but only was an endorser on plaintiff's notes to A, the fact that the intestate's name appears in the body of the contract does not impose a personal liability upon him.

2. Where an agent acts within the scope of his authority and professes to act in the name and behalf of his principal, he is not personally liable.

3. Where the question of agency in making a contract arises there is a distinction between instruments under seal and those not under seal. In the former case, the contract must be in the name of the principal and must purport to be his deed. In the latter, the question is always one of intent, and when the meaning is clear, it matters not how it is phrased nor how it is signed.

E. K. Bryan for the plaintiff.
Rountree & Carr and *Iredell Meares* for the defendant.

HICKS v. KENAN.

MOTION TO AFFIRM.

Per Curiam: Plaintiff moved in this court to affirm the judgment upon the ground that defendant had not stated her exceptions nor assigned errors, as directed by Rule 27, of this court. The Code, section 550, required, and it is the law now, that the appellant in his case on appeal should "state separately, in articles numbered, the errors alleged." Rule 27 is to the same effect. Clark's Code, p. 920. It provides that "every appellant shall set out, in the statement of the case served on appeal, his exceptions to the pleadings, rulings and judgment of the court, briefly and clearly stated and numbered. No other exceptions than those set out or filed, and made a part of the case or record, shall be considered by this court," with certain reservations therein specified. The statute and rule are plainly worded and should be easily understood. They require an assignment of the errors relied on to be tabulated and inserted in the case or record, preferably at the end. This is a reasonable requirement, and a usual one in appellate proceedings. Many courts in other jurisdictions prescribe as the penalty for non-observance, dismissal of the appeal. We are not disposed to enforce the rules of this court harshly, but with all the leniency consistent with the prompt and orderly transaction of the business of the court. It was clearly intended that the statute and rule should be observed. Compliance with them will greatly facilitate the hearing and decision of cases upon their real merits. It will be best for counsel, the court and suitors, if due heed is given to the duty of appellants in this respect. This court has more than once called attention to this provision of the law, and has endeavored to impress upon those concerned, the importance of preparing cases in accordance therewith. *Taylor v. Plummer*, 105 N. C., 56; *McKinnon v. Morrison*, 104 N. C., 354; *Wilson v. Wilson*, 125 N. C., 525; *State v. Blankenship*, 117 N. C., 808. Many of the records in this

court show a strict compliance with the rule, and this is sufficient evidence of the fact, not only that it has not escaped the attention of the bar, but that its provisions are well understood. We hope a word to the wise and prudent practitioner will be quite sufficient, and that in the future the transcripts sent to this court will be entirely free from this defect.

In this case the exceptions have been separately stated and numbered, though they are not brought together at the end of the case. While this is not a strict compliance with the statute and rule, the error intended to be assigned is so plainly apparent that we deny the motion, but, at the same time, we have deemed it a fit occasion to again remind members of the bar that there still exists the necessity of preparing cases on appeal in accordance with the simple requirement of the statute, the importance of which has been emphasized by formulating its substance into a rule of this court.

We deny the motion, and the case will now be heard upon its merits.

Motion Denied.

ON THE MERITS.

ACTION by R. W. Hicks against Mary H. Kenan, Executrix of W. R. Kenan, heard by *Judge O. H. Allen* and a jury, at April Term, 1905, of the Superior Court of NEW HANOVER County.

Plaintiff sued defendant to recover $136.25 and interest, a part of the proceeds of the collection of an account due by W. W. Blair to R. W. Hicks, and assigned by the latter to H. C. McQueen, W. R. Kenan and C. A. Healy, that being the amount received by the said Kenan. Plaintiff introduced in evidence the following paper:

EXHIBIT "A."

"WILMINGTON, N. C., November 23, 1901.

Messrs. H. C. McQueen, W. R. Kenan and C. A. Healy:

I hereby transfer the account, $595, owing me by W. W. Blair, same to be divided between yourselves, as interests may appear.

R. W. HICKS.

Above amount is correct and approved.

W. W. BLAIR."

Plaintiff contended that the account was assigned as collateral security for a debt owing by Hicks to Kenan, McQueen and Healy, and not as a payment.

Mr. Bryan, a witness for the plaintiff, testified: Some time after the execution of the transfer of Blair's account or due bill, I saw Hicks, Healy, McQueen and Kenan sign the paper which has been offered in evidence, and marked Exhibit "B." In December, 1901, or January, 1902, there was a meeting at Mr. Kenan's office of the Murchison National Bank, W. R. Kenan, C. A. Healy, representing the molasses contracts of Hicks, myself and Hicks, with reference to his indebtedness. Hicks was then indebted to a large amount. Kenan was present and did most of the talking; he was the endorser to the Atlantic National Bank for Hicks. I asked what the creditors demanded of Hicks, and Kenan said they wanted Hicks to execute a mortgage on his store, etc. (Hicks was present). They were threatening Hicks with prosecution. I submitted a proposition which was finally consummated in the paper which I hold in my hand, marked Exhibit "B." After the execution of the paper, I demanded the Blair account of McQueen, which had not been paid at that time. I afterwards met Kenan and made demand on him for his part, and told him that I had been informed that it had been paid up, and he said that he would not turn it over; I then asked him if it

was not put up as collateral security for the debt which Hicks owed him and McQueen and Healy. I called his attention to the Blair paper, and he said that it was, and that he would not turn it over because he understood he was to keep the paper and apply it to the debt. He said, "If you get it, it will be by law suit." He admitted that it was put up as security for the debts referred to in agreement marked Exhibit "B." (To each and every part of the foregoing testimony, defendant objected, the objection was overruled and defendant excepted). Cross-examination. At the time agreement "B" was signed, the paper marked "A" was not mentioned. I did not know of it at that time, and it was not discussed at the time Exhibit "B" was executed. The drafts and notes referred to in Exhibit "B" are the drafts and notes Hicks had given for the molasses, and there is nothing in the agreement about the account owed by Blair. I told Hicks to surrender all claim for his, Hick's, right to an accounting from the Murchison National Bank, Kenan and Healy for the molasses that Hicks had turned over to them as security for his indebtedness to them and let them keep the molasses in full settlement of their indebtedness against Hicks, and I thought they would be satisfied. Neither Hicks nor Kenan, McQueen nor Healy, made mention of the paper "A", until afterwards. Kenan came into it by reason of being an endorser of Hicks at the Atlantic National Bank, for twelve or thirteen thousand dollars, he having paid the note which he was holding. When I talked with Kenan, he got mad and said he had lost more than two thousand dollars by signing the note. Hick's contention is that the two thousand dollars lost by Kenan was settled by agreement "B," but not what he got on the Blair account, which Kenan now owes Hicks. The Blair due bill was not paid until I made demand for its return, but was paid at the time Kenan admitted to me it was put up as security.

Plaintiff introduced the agreement known in the case as Exhibit "B." Defendant objected to its introduction. Objection overruled and defendant excepted.

It was provided in the paper, dated February, 1902, which is called in the case Exhibit "B," and is the agreement between Hicks and his creditors, that the latter should keep certain molasses which Hicks had theretofore delivered to them as security for their claims—notes, drafts and accounts—and the creditors should fill certain orders for molasses which Hicks had already taken, and that what was left should be the property of the creditors, and be taken by them in full satisfaction and payment of their said claims, and they should make no further demand upon Hicks, on any claim then existing against him. This agreement was signed as follows: "R. W. Hicks, C. A. Healy, by Cyrus Healy, attorney; W. R. Kenan, representing Atlantic National Bank; H. C. McQueen, President of Murchison National Bank." Plaintiff rested.

At the close of plaintiff's testimony, defendant moved to dismiss and for judgment as in case of nonsuit, under the statute. Motion overruled and defendant excepted. There was no testimony for the defendant. Verdict for plaintiff. Motion for new trial overruled and defendant excepted. Judgment for plaintiff, and appeal by defendant.

E. K. Bryan for the plaintiff.
Rountree & Carr and *Iredell Meares* for the defendant.

WALKER, J., after stating the facts: The decision of this case must depend very much upon the form of the writing containing the agreement of Mr. Hicks with his creditors, and the mode of its signature by Mr. Kenan. We think that when thus considered, even, if necessary and permissible, in connection with the testimony of Mr. Bryan, it is quite conclusive that the defendant's intestate did not sign the contract for himself as a principal, but for the Atlantic National Bank for whom he stood in the transaction. Mr. Kenan annexed to his signature the words "Representing the Atlantic National

Bank," and it would require extremely strong words in the body of the instrument to control the effect of that form of signature, and we do not think any such words are to be found there. The contract was intended to be a satisfaction of all notes, drafts and accounts, and at that time Mr. Kenan did not hold any claim against Mr. Hicks thus evidenced. He was endorser on Mr. Hick's note to the Atlantic National Bank, and for this reason, we presume, he was in the meeting of creditors to represent the bank, and incidentally to protect his own interests. The fact that his name appears as one of the parties of the second part (Hicks being the party of the first part), can make no difference, and should not impose a liability on him which would not otherwise exist, especially as he was careful to use words, namely, "Representing the Bank," which plainly exclude the idea that he was acting for himself, and as the insertion of his name in the body of the agreement may have been purely accidental. At any rate we will not permit it to outweigh other parts of the instrument, which clearly manifest the intent.

When an agent acts within the scope of his authority, and professes to act in the name and behalf of his principal, he is not personally liable. This is the general and well settled rule. Where the question of agency in making a contract arises, there is a distinction between instruments under seal, and those not under seal, or by parol. In the former case it is held the contract must be in the name of the principal, and must purport to be his deed, and not the deed of the agent. In the latter case, the question is always one of intent, and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the law maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose, that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent

for the principal or with the name of the principal by the agent, or otherwise. *Whitney v. Wyman,* 101 U. S., 392; *Sun Pr. & P. Asso. v. Moore,* 183 U. S., 642. In the last cited case, at page 648, it is said: "The intent developed is alone material, and when that is ascertained, it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so. Now, while Lord is referred to in the body of the first writing as an individual, he signed the agreement 'for the Sun Printing & Publishing Association.' Clearly this was a disclosure of the principal, and an apt manner of expressing an intent to bind such principal." The law as thus stated and applied, has been adopted by this court and commended as having been approved by the best authorities, and as containing in itself a just and true exposition of the principle, which should govern in such cases. *Fowle v. Kerchner,* 87 N. C., 49. *Ruffin, J.*, for the court says in that case: "When the form of the instrument clearly indicates it to be done in behalf of another, the court must give it the construction that it is not the personal contract of the party signing the instrument, and no consideration respecting the plaintiff's remedy against any other party, should prevail with the court to change the contract." *Rice v. Gore,* 22 Pick., 158; *McBreath v. Haldimand,* 1 Term Rep., 172; *Deslandes v. Gregory,* 105 E. C. L. (2 El. & El.), 610; *Lyon v. Williams,* 5 Gray, 557. *Fowle v. Kerchner* is a very strong authority, for, in that case, if the defendants were not liable, then nobody was liable to the plaintiffs on the contract, and besides, the defendants signed the contract in their individual names. See also *Hite v. Goodman,* 21 N. C., 364; *Potts v. Lazarus,* 4 N. C., 180; *Meadows v. Smith,* 34 N. C., 18. The case of *McCall v. Clayton,* 44 N. C., 422, is much like our case and governs it in principle. We are constrained to think this is a case of agency and that the agency is disclosed upon the face of the contract. Such being the case, Mr.

Kenan was not bound by any of its terms. This appears to us to be made perfectly clear, when we examine the paper in connection with the oral testimony introduced. Mr. Kenan was merely endorser of the note of the plaintiff to the bank. He was in that capacity interested, it is true, in having the bank debt paid or adjusted in some way, but there was no reason why he should become personally a party to the paper in order to accomplish this end. If the bank was paid, he was exonerated by operation of law. The bank, after it had received payment in full, could not, of course, recover of him what his principal, Mr. Hicks, did not then owe. The evidence shows that Mr. Kenan had to pay $2,000 on the note, and we do not think it can be successfully shown to have been the intention of the parties that the bank should be paid out of the proceeds derived from the sale of the molasses, and that Mr. Kenan should lose his right to a security he held, for any payment he may have made on the debt to the bank. Mr. Kenan, as we have already said, did not hold any evidence of indebtedness against Mr. Hicks, of the kind described in the contract (Exhibit "B"). If he had paid anything on the note in the bank, his claim against Mr. Hicks was for money paid to his use. It was the intention to discharge the particular indebtedness described, and not any obligation of Mr. Hicks to his surety, which was secured by collateral. The general question as to the construction of such contracts and the liability of a party who has signed in a representative capacity, is fully discussed by *Mr. Justice Connor,* in the recent case of *Leroy v. Jacobosky,* 136 N. C., 443.

It is evident that Mr. Hicks was in very embarrassed circumstances, and was willing to surrender absolutely what he had already turned over to his creditors, provided he obtained a full acquittance from all further liability to them. The construction we have given to the agreement is in full harmony with this scheme, which the evidence shows to have been the one contemplated by the parties. It would not be just to

the surety, if we should hold that he must give up a security held by him for his indemnification, simply because his principal had received property which may have been sufficient to satisfy his note, or to pay whatever sum was then due thereon, if the surety had already incurred liability for, or paid any part of, the debt. It would require the plainest sort of language to convey any such idea, and there is no reason why we should so hold, unless the intention to that effect has been clearly expressed.

So far we have confined ourselves to the nature of the transaction as disclosed by the contract, and to certain phases of the evidence, but it seems from the latter that Mr. Kenan himself thought there was an understanding at the time the contract was made, that he should keep the Blair account, and appply it to the debt, and for this reason he refused to surrender it and added, "If you get it, it will be by law suit." He then said that he had lost more than $2,000 by signing the note of Mr. Hicks to the bank. Besides, the evidence shows that the Blair account was not mentioned when Exhibit "B" was written and signed, and it was not considered in coming to the agreement embodied in that paper.

We think the court erred in overruling the motion to dismiss, even if the evidence be viewed most favorably for the plaintiff, which is required to be done in testing the validity of a motion to nonsuit. The other question, as to the competency of the oral testimony introduced by the plaintiff to show that the account against Blair was assigned as collateral security, need not be considered, as a ruling upon that question is rendered unnecessary by our decision of the case upon its full legal merits in favor of the defendant. It may be well, however, on that point to refer to the cases of *McDowell v. Tate,* 12 N. C., 249; *Knott v. Whitfield,* 99 N. C., 76; *Vestal v. Wicker,* 108 N. C., 21, and *Terry v. Robbins,* 128 N. C., 140, which bear upon the question presented by the exception. The case first cited is very much like ours in its

facts. For the sake of the argument, we have treated the assignment as if it was a collateral security, and not a payment. There was error in the decision of the court, as above indicated.

Error.

JACKSON v. TELEGRAPH CO.

(Filed October 17, 1905).

Principal and Agent—Acts and Declarations of Agent—Master and Servant—False Imprisonment—Vindictive Damages—Abuse of Lawful Process—Issues.

1. The court must be satisfied that an agency has been shown at least *prima facie*, before anything that the alleged agent has said or done can be submitted to the jury as evidence.

2. In passing upon the question of agency, the court did not err in permitting the jury to consider "any evidence of the acts of M (an alleged agent), in connection with the work of the defendant, and whether the defendant was putting up the poles on the land claimed by the plaintiff, and whether M was in charge of the construction work with authority, and whether he was in control of the labor and material and gave direction" as to how the work should be done.

3. Where the servant does a wrong to a third person, the rule *respondeat superior* applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business.

4. A servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own.

5. A finding that the defendant, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect its poles on his land, makes the defendant liable therefor.

6. Where the jury found that the defendant's agent arrested the plaintiff not because the plaintiff had assaulted him, but to put him out of the way, and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages were allowable.

7. The jury, in addition to compensatory damages, may award exemplary, punitive or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly or with criminal indifference to civil obligations, or has been guilty of an intentional and wilful violation of the plaintiff's rights.

8. In an action for abuse of process, it was not error to give the defendant's prayer "that if the plaintiff assaulted M with his gun, the latter had the right to have him arrested, and the defendant would not then be liable," with the following qualification, "unless the jury further find that M did not have the plaintiff arrested for the assault, but in order to get rid of him so that defendant's work could go on."

9. An action for damages lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceedings.

10. There is no error in refusing to submit issues tendered by the appellant if he has the full benefit of them in those which are submitted.

11. The court does not approve of issues which embody evidentiary facts instead of the ultimate facts to be found by the jury, but where no harm has come to the appellant by reason of this defect, it is not reversible error.

ACTION by L. C. Jackson against American Telephone and Telegraph Company of North Carolina, heard by *Judge G. S. Ferguson* and a jury, at the May Term, 1905, of the Superior Court of CUMBERLAND County. From a judgment for the plaintiff, the defendant appealed.

Plaintiff brought this action to recover damages for false imprisonment. He alleged that one McManus caused a warrant to be issued by a magistrate for his arrest upon the

charge of an assault with a gun, and that he was taken into custody by the sheriff and confined in jail for about a day. There was evidence tending to prove the false arrest and imprisonment, and the case turns upon the question whether McManus acted for and in behalf of the defendant, as its agent, in suing out the warrant. The issues submitted, with the answers thereto, were as follows: "1. Was J. C. McManus the agent of the defendant company and in charge of the work? Ans. Yes. 2. Did J. C. McManus procure the plaintiff to be arrested, for the purpose of getting him out of the way, in order to put up the telephone and telegraph poles across the plaintiff's land while he (the plaintiff) was under arrest? Ans. Yes. 3. Was such arrest without probable cause, and for the purpose of enabling the defendant's agents and servants to put up the telephone and telegraph poles upon said land claimed by the plaintiff? Ans. Yes. 4. Did the defendant company, by its agents and servants, put up telephone and telegraph poles across the land claimed by the plaintiff, while the plaintiff was under arrest, and still continue to keep said poles and continue to use them? Ans. Yes. 5. What damage, if any, is the plaintiff entitled to recover? Ans. $900."

There was evidence tending to show that the American Telephone and Telegraph Company was extending its line into Cumberland County, and that McManus was in charge of a squad of hands who were putting up and stringing wires on them near the plaintiff's home. Plaintiff testified that "McManus was having the poles put up, the wire strung, and telling the hands where to go and what to do. There were thirty-five or forty hands, and McManus was in entire control." Another witness, John C. Ratley, testified: "I saw McManus in charge of a crowd of hands, pushing them on, hurrying them up. I stayed with him a while and then came back home. He had about fifty hands." There was also evidence tending to show that plaintiff had forbidden McManus

from erecting poles on his land, and that the arrest was made in order to put him out of the way until the work could be done, McManus having threatened beforehand to put plaintiff out of the way until the hands could do the work. The poles were put up and the wire strung while the plaintiff was under arrest, or in jail. McManus called at the home of the officer and told him he wanted the arrest made, and that it must be done that evening. He hired a team, and an officer went with him to the plaintiff's house and made the arrest. McManus then went to the place where the hands were working, and said that he wanted the wire put up and that he would pay double wages for the work done after night. They commenced work about half hour after sundown and continued into the night, and the poles were put up and the wire strung. When plaintiff refused to permit them to construct the line upon his land, and ordered them to leave, McManus replied, "I will put you out of the way, or I will have the poles up before sundown." When the case was called for trial before the justice, McManus failed to appear, and the plaintiff was discharged. The justice found that the prosecution was frivolous and malicious and taxed McManus with the costs. Defendant introduced testimony tending to show that it had two departments engaged in the building of its line, the right of way, and the construction departments, and that Fred Linson was foreman of the construction department and McManus was assisstant foreman and employed by Linson, the latter having been appointed by Campbell, the superintendent of construction; that Jackson assaulted McManus with his gun, and that the arrest had nothing to do with the work of the company, and was not authorized by the company or any of its agents; that Jackson signed a "voucher" in the regular form, giving defendant the right to build, operate and maintain its line on the land, stating that it was his wife's property, and afterwards claimed the land as his own and refused to carry out the agreement, and that

the work was done by Linson's force in the belief that defendant had secured the right to use it, and without any reference to plaintiff's arrest; that none of the agents or servants of defendant was authorized to arrest the plaintiff, and that McManus was not with the force when the arrest was made. These are substantially the facts which the testimony tended to establish on either side, and which are necessary to be stated for an understanding of the case. The defendant's counsel asked that certain instructions be given to the jury, which will be hereafter noticed. After a motion for a new trial, which was refused, judgment was entered upon the verdict. Defendant excepted and appealed.

Thos. H. Sutton for the plaintiff.
N. A. Sinclair for the defendant.

WALKER, J., after stating the case: The principal questions discussed in this court related to the competency of the acts of McManus as proof of his agency for the defendant, and to the liability of the defendant for his conduct in unlawfully causing the plaintiff's arrest. The defendant's counsel contended that no authority to bind the defendant had been shown, and that his acts were not competent to show any such authority, but that it must be established, if at all, by evidence independent of his acts and declarations. It is common learning that acts and declarations of a third person are not evidence against a party unless such third person be his agent, and it is equally well settled that the agency must be first shown, otherwise than by such acts and declarations, before they are admissible. The court must be satisfied that the agency has been shown, at least *prima facie,* before anything that the alleged agent has said or done, can be submitted to the jury as evidence. *Williams v. Williamson,* 28 N. C., 281; *Grandy v. Ferebee,* 68 N. C., 356; *Francis v. Edwards,* 77 N. C., 271; *Gilbert v. James,* 86 N. C.,

244; *Daniel v. Railroad,* 136 N. C., 517. But this elementary rule has not been violated in this case, and the reason upon which it is founded does not apply to the evidence supposed to fall under its condemnation. The court expressly charged the jury that they must not consider any declarations of McManus upon the question of his agency, but that they must first find upon the evidence, excluding his declarations, that he was the agent of the defendant, in charge of its work, and authorized to act in its behalf, in constructing the telegraph line, before any of his acts done, or declarations made in the prosecution of the agency, could become competent against the defendant. In passing upon the question of agency, the court did permit the jury to consider "any evidence of the acts of McManus in connection with the work of the defendant, and whether the defendant was putting up the poles on the land claimed by the plaintiff, and whether McManus was in charge of the construction work with authority, and whether he was in control of the labor and material, and gave directions" as to how the work should be done. But what we understand the court to mean by this instruction is that if McManus, by and with authority of the company, was doing the work described, he was in law the agent of the company to the extent of charging it with liability for his acts so done in furtherance of the principal's business, and we think the jury must have so understood it. Thus construed, the charge did not leave to the jury the bare acts of McManus as evidence of his agency, which would clearly have been error, but the jury were required to consider all the evidence for the purpose of finding whether he had the authority to act as he did, and the particular acts of McManus were mentioned so that the jury might intelligently apply the evidence, and ascertain whether he possessed authority to do those particular acts. There was evidence of his authority, for it must be remembered that the defendant's witness, Fred Linson, testified that he was foreman of

construction, and McManus was his assistant. It makes no difference that he was employed directly by Linson. By virtue of his employment, he became the servant of the defendant. He was not, perhaps, in the strict and technical sense, its agent, but its servant. In either relation, the principal or the master, as the case may be, is chargeable with liability for his acts done in the course of his employment and in furtherance of the business he had in charge.

This brings us to the consideration of the other question, as to the liability of the defendant for the act of McManus, in arresting the plaintiff. Whoever commits a wrong is liable for it, and it is immaterial whether it be done by him in person or by another acting by his authority, express or implied. *Qui facit per alium facit per se.* Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment, and in furtherance of the master's business. "A servant is acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." Tiffany on Agency, p. 270. We see, therefore, that the master is liable, even if

the act is wilful and deliberate, provided it was committed in the course of the employment and for the master's purposes, and not merely for the servant's private ends. Tiffany, *supra*, 273; *Pierce v. Railroad*, 124 N. C., 83; *Cook v. Railroad*, 128 N. C., 333. In this case the jury have found that the defendant, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect telephone and telegraph poles on his land. If this is not an act done in the course of the employment and in furtherance of the master's business, for his benefit and advantage, it would be hard to conceive of one which would come under that class. The case is in principle like that of *Railroad v. Harris*, 122 U. S., 597, which has, at least twice, been approved by this court. *Hussey v. Railroad*, 98 N. C., 34; *Redditt v. Mfg. Co.*, 124 N. C., 100. In *Harris's case* the defendants by servants committed, it is true, a direct and violent trespass upon lands in order to carry on their master's work, and in doing so shot and injured the plaintiff; but is there any difference in law between the two cases? It is not the quality of the act that determines a master's liability, but the fact that it is done by his implied direction, that is, within the scope of the servant's authority, in the course of his employment and in furtherance of his master's interests. *Daniel v. Railroad, supra; Daniel v. Railroad*, 117 N. C., 592; *Kelly v. Traction Co.*, 133 N. C., 418; *Lovick v. Railroad*, 129 N. C., 427; *Williams v. Gill*, 122 N. C., 967; *Pierce v. Railroad*, and *Cook v. Railroad, supra*. It was in this case a question for the jury under proper instructions from the court, whether McManus in arresting the plaintiff was performing his master's business, or was engaged in some pursuit of his own. *Hussey v. Railroad*, and *Daniel v. Railroad, supra*; Tiffany on Agency, 271. The court charged fully and correctly in respect to this matter. The cases of *Redditt v. Mfg. Co., supra; Willis v. Railroad*, 120 N. C., 508; *Moore v. Cohen*, 128 N. C., 345, and

Daniel v. Railroad, 136 N. C., 517, cited by the defendant's counsel, do not militate against our conclusion in this case. In those cases the wrongful act of the agent, attemptd to be imputed to his principal, was clearly not within the course of the agent's employment, or within the scope of his authority; while in this case there is evidence that the tort was committed directly in furtherance of the master's business, which was then being performed by his servant. This distinction is recognized in the cases cited, espccially in *Willis v. Railroad, supra,* and in *Daniel v. Railroad,* 136 N. C., 517.

We will now consider the defendant's prayers for instructions. The first as to the declarations of McManus was given. The second, third and fourth, to the effect that there was no evidence of his agency, or of his authority to do the particular act, were properly refused, as we have shown. The fifth prayer, that the acts of the agent, to bind the principal, must be within the scope of his authority, was not germane to the issues as framed, but it was substantially given by the court in charging upon the issues as submitted to the jury, or the defendant at least got the full benefit of the instruction requested, though not in the form it was asked to be given. The seventh prayer as to punitive damages, was properly refused. The court charged correctly when it permitted the jury to award punitive damages. If McManus, as the jury found, arrested the plaintiff, not because the latter had assaulted him, but to put him out of the way, and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages might well be allowed by the jury in addition to compensation for the wrong. The court in its charge made the question of probable cause turn upon whether the plaintiff had or had not assaulted McManus, and they having decided that there was no probable cause, it follows that they found there was no assault, and that the arrest was wholly unjustifiable, and a wanton, high-handed and oppressive act, for which punitive damages may be allowed.

Remington v. Kirby, 120 N. C., 320. The verdict was moderate, in view of the circumstances, and the jury do not seem to have allowed much, if anything, in the way of exemplary damages. "The doctrine is well settled that the jury, in addition to compensatory damages, may award exemplary, punitive or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or with criminal indifference to civil obligations" (*Railroad v. Prentiss,* 147 U. S., 106), or (the defendant) has been guilty of an intentional and wilful violation of the plaintiff's rights. *Railroad v. Arms,* 91 U. S., 489; *Hansley v. Railroad,* 117 N. C., 565. In the sixth prayer for instructions, the defendant requested the court to charge that if the plaintiff assaulted McManus with his gun, the latter had the right to have him arrested and the defendant would not then be liable, which was given with the following qualification—unless the jury further find that McManus did not have the plaintiff arrested for the assault, but in order to get rid of him so that the defendant's work could go on. The cause of action in the complaint is for false imprisonment, while the issues as framed by the court mainly presented a case of malicious abuse of process. In the latter, it makes no difference whether there was probable cause for issuing the process or not. It differs from malicious prosecution in two respects: first, in that want of probable cause is not an essential element, and, second, in that it is not necessary that the original proceedings should have terminated; and it differs from false imprisonment in that, among other things, a warrant valid on its face is no defense if in any respect there has been an abuse of the process. 1 Jaggard on Torts, pp. 632-634. "An action for damages," says Jaggard, "lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent pro-

ceedings." In view of the principles stated and supported by the authorities cited, we cannot see any error in the amendment by the court of the instruction asked in the sixth prayer. The jury found that there was no assault by the plaintiff, and that there was a clear abuse of the process of the court.

We think His Honor submitted to the jury all the questions involved with the utmost fairness, and explained fully the principles of law applicable to the case. The charge was as favorable to the defendant as it was entitled to expect under the evidence. There was no error in refusing to submit the two issues tendered by the defendant. It had the full benefit of them, as they were embraced by those which were submitted, and this is all that is required. *Warehouse Co. v. Ozment,* 132 N. C., 839; *Deaver v. Deaver,* 137 N. C., 240.

We do not approve of issues which, as in this case, embody evidentiary facts instead of the ultimate facts to be found by the jury, and which are therefore the only issuable facts. *Grant v. Bell,* 87 N. C., 34; *Patton v. Railroad,* 96 N. C., 455. But we cannot see that any harm has come to the defendant by reason of this defect in the issues, as the facts necessary to support the judgment sufficiently appear. *Patterson v. Mills,* 121 N. C., 258; *Ratliff v. Ratliff,* 131 N. C., 425. We find no reversible error in the proceedings of the court below, and it must be so certified.

No Error.

HODGE v. HUDSON.

(Filed October 17, 1905).

Deeds—Fraud—Evidence.

1. In an action by plaintiff, who was an illiterate man, to set aside a deed because it was obtained by fraud and without consideration, evidence that the defendant, an educated man and a physician, went to the plaintiff's premises, and representing that he had bought in an old mortgage debt, which plaintiff claimed had been paid, procured from the plaintiff, without any payment to him, the execution of a deed which was written by the defendant and was different from what was represented, and the existence of the mortgage debt was not shown, *held*, the case was properly submitted to the jury.

2. In an action to set aside a deed for fraud, where the plaintiff had testified that the purport of the deed which was written by the defendant, was different from what was represented, and the plaintiff could not read, it was competent to ask him, "Who told you that the deed conveyed all your interest in the land," not to prove the declaration of the third party, but to corroborate the plaintiff that as soon as he learned that fact, he put up notices repudiating the deed.

3. In an action to set aside a deed for fraud and for want of consideration, endorsements upon a mortgage, which the defendant claimed to have bought in, were properly excluded, the mortgage note not being produced.

4. Where the mortgage debt had not been shown or proven, it was not competent to prove a declaration made by R that she owned the debt, nor was the evidence as to the purchase of the mortgage by the defendant from R, who was not shown to have the legal title, competent.

ACTION by Isham Hodge against W. L. Hudson, heard by *Judge C. S. Ferguson* and a jury, at the May Term, 1905, of the Superior Court of CUMBERLAND County. From a judgment for the plaintiff, the defendant appealed.

N. A. Sinclair for the plaintiff.

H. L. Cook; Pou & Fuller; T. H. Sutton and *W. A. Stewart* for the defendant.

CLARK, C. J. This is an action to set aside a deed because it was obtained by fraudulent representations, and without consideration. The plaintiff was an illiterate colored man, who had been in possession of the land for twenty-one years under a deed therefor. The defendant, an educated man and a physician, went to the plaintiff's premises, and representing that he had bought in an old mortgage debt of plaintiff (which the latter claimed had been paid), procured from the plaintiff, without any payment to him, the deed now sought to be set aside. Both parties gave in their version of the transaction, and the jury found for plaintiff. There was evidence to permit the cause to be submitted to the jury and the motion for nonsuit was properly refused.

The plaintiff testified that the deed was made on Wednesday or Thursday, and that he put up notices Friday or Saturday forbidding the defendant to come on the land. As he had testified that the purport of the deed which was written by the defendant, was different from what was represented, and the plaintiff could not read, it was competent to ask him "who told you that the deed conveyed all your interest in the land"—not to prove the declaration of the third party, but to corroborate the plaintiff that as soon as he learned that fact, he put up notices repudiating the deed. The endorsements upon the mortgage were properly excluded. The mortgage note was not produced, the alleged endorsements on the mortgage would not have conveyed the debt, nor the property (for title in the endorsers was not shown), and it does not appear that the signatures of the alleged endorsers were proven. Nor was it competent to show by plaintiff that Louise Robeson owned the debt. It would have been only her declaration, if she had made it, the debt not being shown or

proven. Besides, the defendant testified that he bought the mortgage from her agent, E. Smith, her uncle, agent and former guardian; who, when introduced as a witness for the defendant, and asked if he had such transaction with defendant, limited his reply to a statement that he had never seen the alleged mortgage note. The existence of the note is not proven by any one, nor is its loss, if lost, attempted to be accounted for. The defendant's prayers for instructions were given, except the fourth, which was on the reverse side of the sheet, and was overlooked by the court. This would not of itself correct the error in failing to give it, but the existence of the debt not having been shown, and the note not having been produced, the prayer should not have been given, except that part which was given in the charge. The evidence offered as to the purchase of the mortgage by the defendant from Louise Robeson, who was not shown to have the legal title, was irrelevant. The matter at issue is whether the defendant procured the execution of the deed by fraudulent representations, of which there was evidence, if believed by the jury.

It appears from the defendant's evidence that he paid the plaintiff nothing; the existence of the alleged mortgage debt is not shown; and in the conflict of testimony as to the representations made to the plaintiff, the jury found that "the deed from plaintiff to the defendant was procured by the fraudulent misrepresentation of the defendant." The other exceptions do not require discussion.

No Error.

COXE v. SINGLETON.

(Filed October 24, 1905).

Issues—Witnesses as to Character—Impeachment of Verdicts.

1. The issues arise upon the pleadings and not upon evidential facts, but where there are no written pleadings, it is the duty of the court to so frame the issues after hearing the evidence, as to develop the whole case and to present to the jury the real issues of fact in dispute.

2. Where the plaintiff's witness, on cross-examination, testified to the good character of the defendant, a question on redirect examination, as to whether he had not heard that the defendant had committed certain offenses, was properly excluded.

3. An exception to the refusal of the court to set aside the verdict, because several of the jurors signed a paper to the effect that they did not fully understand the issues and the legal effect of their findings, is without merit, as jurors cannot be heard to impeach their verdict.

ACTION by Thomas C. Coxe against Robert Singleton, heard by *Judge B. F. Long* and a jury, upon appeal from a Justice of the Peace, at the August Term, 1905, of the Superior Court of ANSON County.

The plaintiff alleged that he sold the defendant certain walnut lumber at a stipulated price, $20; that the defendant refused to take and pay for the same. The defendant denied the contract, and also that the plaintiff had performed it, alleging that the lumber tendered was worthless. The court submitted the following issues: 1. Did defendants contract with plaintiff to purchase lumber from him as alleged by plaintiff? A. Yes. 2. If so, did plaintiff comply with his part of the contract and the terms thereof, as alleged? A. No. 3. What was the value of the lumber hauled by

plaintiff to defendants for delivery under the alleged contract? A. $5.

Upon the finding of the jury the court dismissed the action and the plaintiff appealed.

Fred J. Coxe for the plaintiff.
No counsel for the defendant.

BROWN, J. 1. The plaintiff excepted to the issues submitted. They plainly cover the controversy between the parties as disclosed by the evidence. The issues were sufficient to enable the jury to intelligently find the facts in dispute, and to enable the plaintiff to present every view of the evidence contended for by him. It is true the issues arise upon the pleadings and not upon evidential facts, but where there are no written pleadings, as in this case, it is the duty of the court to so frame the issues after hearing the evidence as to develop the whole case, and to present to the jury the real issues of fact in dispute. His Honor did that in this case.

2. The witness Marshall testified to the good character of the plaintiff, and also, on cross examination, to the good character of Robert Singleton, one of the defendants. Upon redirect examination, the plaintiff's counsel asked the witness: "Have you not heard that the defendant, Robert Singleton, committed rape upon a negro girl?" Also "Have you not heard that Robert Singleton padded his pay roll at the mill?" These questions were excluded and the plaintiff excepted. We think the ruling of the court was fully sustained by the decisions of this court wherein the rule of practice is fully discussed. *State v. Bullard*, 100 N. C., 488; *State v. Boswell*, 13 N. C., 209; *Barton v. Morphes, ibid*, 520.

It is to be noted, however, that the plaintiff had full benefit of the evidence upon cross-examination of Robert Singleton, who admitted that he had been accused of padding his pay roll at the mill, and had been charged with and acquitted of the crime of rape.

3. The plaintiff presented to the court a paper writing signed by the several jurors who tried the case, to the effect that they did not fully understand the issues and the legal effect of their findings, and moved to set aside the verdict. The court declined and the plaintiff excepted. It is familiar learning that jurors cannot be heard to impeach their verdict. If that were allowed, law suits would seldom be determined.

The legal effect of their findings is to put an end to this case. The fact that the jury unnecessarily answered the third issue, is conclusive that they intended to find that the plaintiff did not perform the contract on his part, for if the lumber tendered was worth only $5, it fell far short of the required quality, according to the plaintiff's own version of the contract.

We think there was no error committed, and the judgment is

Affirmed.

LOVE v. LOVE.

(Filed October 24, 1905).

Executors and Administrators—Sale for Assets—Appeals—Duty of Appellants.

1. In a proceeding by an administrator to sell land for assets, the clerk made an order of sale in February, 1897, and upon the clerk's minutes appears an entry of appeal by defendants (heirs at law). The land was sold in April, and sale confirmed in May, 1897, and the cause appears for the first time on civil issue docket at January term, 1899, *held*, that a judgment declaring the sale void, pending the appeal, and directing a re-sale, was error, as the appeal was abandoned.

2. Merely craving an appeal is not *taking* an appeal. An appellant must look after his case and see that his appeal is made effectual.

LOVE *v.* LOVE.

ACTION by C. C. Love, Administrator of C. C. Love, Sr., against Rosanna Love and others, heard by *Judge Walter H. Neal*, at the August Term, 1905, of the Superior Court of UNION County.

This is a proceeding brought by the plaintiff as administrator, against the widow and distributees for a settlement of his final account. The cause was referred to a referee; exceptions were filed to his report, and from the judgment rendered, plaintiff appealed.

Redwine & Stack for the plaintiff.
Adams, Jerome & Armfield for the defendants.

BROWN, J. Upon the coming in of the report several exceptions were filed by plaintiff, all of which were overruled by His Honor, except exceptions five and nine. As there is no ninth exception His Honor evidently intended to sustain the fifth and eighth exceptions, relating to the taxation of costs and witness fees. After a careful investigation of the record, we affirm the judgment pronounced by the court below except as to the first and second exceptions, to conclusions of law, whereby the sale of the land is set aside, and a new sale ordered. It appeared that on January 5, 1897, the plaintiff, as administrator, filed a petition to sell the land of his intestate for assets. The heirs at law answered and demanded a statement of an account "showing the nature and character of the indebtedness alleged." This account the clerk proceeded to take. On February 27, 1897, the clerk made an order authorizing the administrator to sell the land described in the petition for assets, subject to the widow's dower. Upon the clerk's minutes or notes of the evidence and proceedings before him appear these words: "Judgment. Appeal by defendant."

The clerk certifies to us upon *certiorari* that the said cause appears for the first time on the civil issue docket at January

Term, 1899. Notwithstanding the entry of appeal, the administrator sold the land on April 5, 1897, and a decree of confirmation was entered May 14, 1897. His Honor held that the sale was void pending the appeal and directed a resale. In this there was error. Had the appeal been properly prosecuted, we would agree with His Honor and the able referee (Mr. Armfield), who tried this case. We think the appeal was abandoned, whether intentionally or not.

This case differs materially from *Lictie v. Chappell,* 111 N. C., 347, upon which the defendants rely. Merely craving an appeal is not *taking* an appeal. The appellant must look after his case and see that his appeal is made effectual. If the clerk fail to forward the case to the judge, or docket it upon the regular civil issue docket (according to the character of the case), it was the appellant's duty in apt time to apply for the proper order to compel him to do so. This appeal was taken in February, 1897. The appeal was not docketed until January, 1899—nearly two years thereafter. In the meantime the plaintiff had suffered the land to be sold and a decree of confirmation entered. An appellant who merely prays an appeal and files his bond, is not relieved of further care in respect to his appeal. He must see that it is brought to a hearing. *Wilson v. Seagle,* 84 N. C., 110; *Blair v. Coakley,* 136 N. C., 409.

The affidavit of Mr. Adams, returned to us along with the clerk's response to the *certiorari,* cannot be considered by us.

Had it been presented to the judge of the Superior Court in due season, he would doubtless have required the appeal to be docketed.

For these reasons we think the sale to Long should stand, and the administrator be charged with the proceeds. The judgment of the court below in that respect is reversed, and the cause remanded to the end that a decree may be entered in accordance with this opinion.

Reversed.

STACK v. RAILROAD.

(Filed October 24, 1905).

Railroads—Ponding Water—Substantial Injury—Evidence —Statute of Limitations.

1. In an action against a railroad for wrongfully ponding water by permanent structure, the cause of action is barred by the statute of limitations if any substantial injury was done to the land prior to five years next before action brought, under Acts 1895, chap. 224.

2. Evidence that the road bed and culvert were built more than forty years ago, and that the water was ponded in a manner substantially similar to that now complained, as much as ten or fifteen years ago, is sufficient to sustain a finding that substantial injury was done prior to five years before action brought, though the plaintiff testified that the ponding had increased of late.

ACTION by J. E. Stack against Seaboard Air Line Railway for wrongfully ponding water on a lot owned by the plaintiff, tried by *Judge Walter H. Neal* and a jury, at the August Term, 1905, of the Superior Court of UNION County.

The plaintiff alleged and offered evidence tending to show that the defendant's road bed crossed a ravine or branch at a point below a lot which was owned by the plaintiff; that the defendant had constructed a culvert or drain under its road bed, which was insufficient to carry off the water of the branch in times of rain, and by reason of such defective and insufficient culvert, the waters of said branch were frequently ponded on the plaintiff's lot, causing great damage to the same; that the culvert and road bed were built some forty years ago, but had only caused substantial damage to the plaintiff's lot within the last four or five years.

The defendant denied that the plaintiff owned the lot or that this was an insufficient structure. It also denied the

damages and pleaded the statute of limitations, and offered evidence tending to sustain its answer.

There were four issues submitted: (1) On the ownership of the lot. (2) As to the alleged negligence of the defendant. (3) On the damage done, and (4) On the statute.

Under the charge of the court, the jury answered the first three issues in favor of the plaintiff, and, in response to the fourth issue, found that the plaintiff's cause of action was barred by the statute of limitations. There was judgment for the defendant and the plaintiff excepted and appealed.

Redwine & Stack for the plaintiff.

John D. Shaw and *Adams, Jerome & Armfield* for the defendant.

HOKE, J., after stating the case: The only exception presented for our consideration was for alleged error in determination of the fourth issue. On that issue the court charged the jury as follows: "Is the plaintiff's action barred by the statute of limitations? Your inquiry would be this: When did the substantial injury start, if the lot was injured? This action was instituted September 6, 1904. The question now is, when did the substantial injury begin? This action began in 1904, and if this injury began more than five years before that, it doesn't make any difference who resided there, the plaintiff or some one else; and this injury has existed for that length of time, that is, if the substantial injury to this property began prior to September 1, 1899; then you would answer the fourth issue 'yes;' if you should find that it was commenced after that time you would answer 'no' that it was not barred. When did the substantial injury begin? If prior to September, 1899, you should answer 'yes;' if since then, you should answer 'no.'"

This we think a correct charge, in accordance with the statute law governing cases of this character, and the de-

cisions of the court. Acts 1895, ch. 224; *Beach v. Railroad,* 120 N. C., 502; *Lassiter v. Railroad,* 126 N. C., 509.

The plaintiff does not seriously argue that the law was incorrectly stated by the judge below as an abstract proposition, but contends that there was no testimony before the court of any substantial injury done to the land prior to the five years next before institution of the suit, and that the judge should have so told the jury. But the case on appeal does not sustain this position. The evidence was to the effect that the road bed and culvert were built more than forty years ago, and both the plaintiff and his witness, S. A. Robinson, tendered by the plaintiff and examined by the defendant, testified that the water was ponded on this lot in a manner substantially similar to that now complained of, as much as ten or fifteen years ago. True, the plaintiff's testimony was to the effect that the ponding had increased of late, owing to certain changes in the grading and drains of the town of Monroe, by which the flow of the surface water into this branch had been accelerated.

Under the charge of the court, however, the jury have determined that substantial injury of the kind now complained of, was done to the plaintiff's property from this very structure, more than five years next before action brought, and has existed continuously since. As we have seen, there was evidence to support the verdict, and on such finding we are clearly of opinion that the plaintiff's cause of action is barred by the statute.

No Error.

HALL v. TELEGRAPH CO.

(Filed October 24, 1905).

Telegraphs—Pleadings—Defective Demurrer—Tender of Judgment—Contracts.

1. A complaint alleged that the defendant negligently failed to deliver the following message sent by plaintiff from Newport News, Va., to Fayetteville, N. C.: "How is mother today? Let me know at once and I will come at once," and that by reason thereof the plaintiff suffered mental anguish, knowing that his mother was sick and that he was forced to go to Fayetteville, at great expense; and that when he reached there he found his mother better, *held*, that a demurrer for that no mental anguish was recoverable was properly overruled, as the cost of the trip is an element of damage, and the allegation as to mental anguish is not stated as a separate cause of action, but as a further element of damage.

2. There is no law or practice which will permit a tender of judgment of one dollar as nominal damages as an aid to a defective demurrer.

3. The complaint averring that the contract was made in Virginia, the rights of the parties will be determined by the laws of Virginia, so far as the same apply.

ACTION by M. H. Hall against Western Union Telegraph Co., heard by *Judge G. S. Ferguson* on demurrer, at May Term, 1905, of the Superior Court of CUMBERLAND County. From a judgment overruling the demurrer, the defendant appealed.

Rose & Rose for the plaintiff.
Busbee & Busbee and *R. C. Strong* for the defendant.

HOKE, J. After some formal allegations, the plaintiff complains and alleges as follows: "That on 7th October, 1902, the plaintiff delivered to the agent of the defendant, at its

office in Newport News, Virginia, the following message: John Hall, care Mr. Herbert Lutterloh, Fayetteville, N. C. How is mother today? Let me know at once and I will come at once. Miles Hall," and that the plaintiff duly paid the defendant the amount charged for the transmission and delivery of the message to the sendee, named therein, and the defendant collected the charges therefor.

That the message was received by the defendant at its office in Fayetteville, N. C., but on account of the carelessness, negligence and gross indifference on the part of the defendant, the message was never delivered to either the sendee or Herbert Lutterloh.

That the sendee, and especially Herbert Lutterloh, is well known to the defendant's agent in Fayetteville, N. C., and the message could have been delivered to either of them soon after its receipt.

That the defendant, having by its carelessness and negligence, failed to deliver the message to the sendee named therein, negligently and carelessly failed to notify the plaintiff of the non-delivery of the same, so that he might be able to give a better address, or to pay any additional charges for its delivery, if any such should be necessary.

8. That by reason of the aforesaid carelessness, negligence and gross indifference on the part of the defendant, the plaintiff suffered great mental anguish by not hearing as to his mother's condition, and, knowing that she was sick and not being able to hear from her by reason of the defendant's gross negligence, he was forced to come to Fayetteville, N. C., to his great expense and loss of time from his work, to-wit, in the sum of $1500; that upon his arrival at Fayetteville, N. C., he found that his mother's condition was much better, and, had the message been delivered, his mental suffering would have been relieved, and he would not have been forced to leave his work and put to the expense of coming to Fayetteville; that the plaintiff has made demand upon defendant

for damages he has suffered, but defendant refuses and still neglects and refuses to pay him therefor;

9. That at the time of the aforesaid negligent conduct of the defendant, the following was the statute law of the State of Virginia relative to such matters as he is informed and believes:

"An act in relation to special damages recoverable of a telegraph company, approved March 2, 1900.

1. Be it enacted by the General Assembly of Virginia that all telegraph companies shall be liable for special damages occasioned by the negligent failure of their operators or servants in receiving, copying, transmitting or delivering dispatches, or of the disclosure of the contents of any private dispatch to any person other than him to whom it was addressed, or his agent, the amount of these damages to be determined by the jury upon the facts in each case. Grief and mental anguish occasioned to the plaintiff by the aforesaid negligent failure may be considered by the jury in the determination of the quantum of damages. Special damages recoverable under this act shall not be barred by regulations of the company concerning the repeating of messages, or by any special undertaking to relieve the company from the consequence of its own negligence. 2. That it shall be in force from its passage."

Wherefore the plaintiff demands judgment against the defendant for the sum of $1,500, the costs of this action, and such other and further relief as he may be entitled to in the premises.

The defendant demurs and for cause shows: "The defendant demurs to the amended complaint for that it does not in whole or in part, or in any part thereof, state facts sufficient to constitute a cause of action. 1. No damages for mental anguish can be recovered under the allegations of paragraph 8 of the complaint, the same being purely speculative, and furthermore, contrary to the language of the written message

forming the basis of this action, and not in contemplation of the parties to the contract of the transmission and delivery thereof. 2. No damages for mental anguish can be recovered under the allegations of paragraph 9 thereof, which sets forth that upon the arrival of the plaintiff at Fayetteville, he found that his mother's condition was much better, and had the message been delivered, his mental suffering would have been relieved, and he would not have been forced to leave his work and put to the expense of going to Fayetteville. But if the court should be of opinion, based upon the allegations in the complaint, that the plaintiff should recover nominal damages, the defendant hereby tenders to the plaintiff the sum of one dollar as such damages, and the costs of the action to the time of the trial hereof, upon this demurrer. Therefore the defendant prays that it go hence without day."

An agreement entered into by counsel is made a part of the record in the cause as follows: "Fayetteville, N. C., May 10, 1905. It is agreed that the copy of the Acts of the Assembly (Virginia, 1899-1900,) in the hands of Rose & Rose, attorneys, be accepted as the statute of Virginia in the case of *Miles Hall v. Western Union Telegraph Co.*, and that the case of *Connelly v. Western Union Telegraph Co.*, 100 Va., 40 S. E. Rep., p. 618, be accepted as the law of the State of Virginia, upon all points therein, in the same case."

This agreement, while somewhat unusual in aid of a demurrer, can, we think, be given effect by considering the same as if it had been written into the complaint, and such was no doubt the design and intent of the parties. Giving the agreement such placing, however, we are of the opinion that the judgment overruling the demurrer should be affirmed.

Here is a plain and concise statement of a cause of action for breach of contract, in the negligent failure of the defendant company to deliver a telegram. It would seem that the character and urgency of the message were such as to notify the defendant that unless a satisfactory answer was received

in regular course of transmission, the plaintiff would go to Fayetteville, which in fact he did, according to the allegations of the complaint. If this be the correct and reasonable interpretation of the message, the cost of the trip to Fayetteville would be an element of damage. There is an additional allegation addressed to the question of mental anguish. This is not stated as a separate cause of action at all, but only as a further element of damage. Its consideration may or may not arise on the further hearing, and in any event the demurrer which seeks to eliminate this feature of the plaintiff's demand at the present stage of his case, is irregular and defective. Giving such defect its technical term, we should say the demurrer is too broad. It goes to the entire complaint and this, as we have seen, contains a good cause of action well pleaded, and if the facts can be proved as alleged, the plaintiff can recover some damage.

The defendant seems to have been sensible of this difficulty, as he tenders a judgment of one dollar as nominal damage, but we are aware of no law or practice which will permit a tender as an aid to a defective demurrer. Code, section 575, *et seq.*, provides that such a tender may accompany an answer, and this alone is its proper placing so far as a pleading is concerned, or in reply to a counterclaim.

The complaint averring that the contract was made in Virginia, the rights of the parties to this controversy will be determined by the laws of Virginia, so far as the same apply. *Bryan's case,* 133 N. C., 607; *Hancock's case,* 137 N. C., 497.

Both a statute of the State of Virginia and a decision of the Supreme Court construing the same are set forth in the complaint and admitted—the one by the demurrer, and the other by the agreement.

But we do not think it desirable or proper that we should discuss or decide the rights of the parties under the law until the facts are before us, after proceedings had in accordance

with the course and practice of the court. Judgment overruling demurrer is affirmed.

No Error.

CONNOR, J., concurs in result.

BROWN, J., did not sit on the hearing of this case.

PERRY v. INSURANCE ASSOCIATION.

(Filed October 24, 1905).

Corporations—Contracts of Mutual Insurance Companies—Officers—Rights of Policy Holders—Dissolution—Personal Liability of Officers—Remedy.

1. The law will not permit persons to hold themselves out as officers of a corporation, make contracts, assume liabilities, receive money, etc., and avoid all responsibility by simply denying the existence of the corporation, or the agency through which it professes to act.

2. The courts seek to sustain and enforce contracts of mutual insurance companies, by looking to the substance and intention, rather than by adopting a technical or strained construction.

3. Neither officers nor members of corporations can evade their plain duty to those with whom contracts are made, by dissolving the organization and leaving creditors unprovided for.

4. Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss.

5. The right of each policy holder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policy holder.

6. The plaintiff cannot hold the officers of the defendant association personally liable for his judgment against it, because they procured its dissolution and the formation of a new company.

7. The plaintiff may, by motion in the cause in which he obtained judgment, have an order directed to the defendant corporation to have the assessment made according to its charter and by-laws, and the court has power to enforce its performance by appropriate orders.

ACTION by T. J. Perry against Farmer's Mutual Fire Association of North Carolina and others, heard by *Judge G. W. Ward* and a jury, at the February Term, 1905, of the Superior Court of UNION County.

Plaintiff recovered judgment in the Superior Court of Union County against the Farmer's Mutual Fire Insurance Association upon a policy issued by said corporation, "by and through the Union and Stanly Branch." The judgment was affirmed by this court at the February Term, 1903, (132 N. C. 283). It appearing from the record in that cause that the Union and Stanly Branch had ceased to exist and that its liabilities had been assumed by the Union Branch, judgment was directed to be entered that the amount be paid by assessments upon the members of that Branch, which was done at the next succeeding term of the court. The judgment not having been paid, plaintiff instituted the present action against the corporation, the Farmer's Mutual Fire Insurance Association, and W. H. Phifer and James McNeely. In the complaint it is alleged, in addition to the foregoing facts, that the defendant Phifer is president, and McNeely is secretary and treasurer of said Union County Branch. That by the provisions of the charter of the defendant, the terms of the policy, and the judgment thereon, it was the duty of the president of the Union County Branch of said corporation to levy an assessment upon all the members of said branch, sufficient to pay the said judgment. That demand was made therefor and refused. That since

the rendition of said judgment, the said branch, through its officers, have paid on account of claims against it, an amount more than sufficient to pay the same. That more than one hundred dollars have been paid to the defendants, the president and the secretary and treasurer, on account of salaries and commissions, and $223 paid to B. D. Austin on a claim which had no preference over the plaintiff.

That since the rendition of said judgment the defendants, the president and secretary, with the intent and for the purpose of preventing the plaintiff from collecting his judgment, called a meeting of the members of said corporation living in Union County and composing said Union County Branch, and attempted to dissolve said branch, and to form another association, of which the defendant, W. H. Phifer, is president, and James McNeely is secretary and treasurer. That the holders of the policies in the Union County Branch were permitted to surrender their policies therein and take out other policies in the new corporation, without the payment of any fee, while new members were required to pay an entrance fee of fifty cents. The plaintiff asks that a mandamus issue commanding the defendant, W. H. Phifer, to levy an assessment sufficient to pay his judgment, and for a personal judgment against the defendant Phifer and McNeely. The defendant corporation filed no answer. The defendants, Phifer and McNeely, joined in an answer in which they say that there is a misjoinder of causes of action. They deny that there was ever organized any such branch of the defendant corporation as the Union County Branch. That if there was ever such a branch, it was not sued by the plaintiff, nor was any judgment ever recovered by plaintiff against such branch. Nor was the defendant corporation ever sued on account of any liability of such branch. They deny that any demand was made on the Union County Branch to levy an assessment to pay plaintiff's judgment, for the reason that there was never any such branch upon which to make a demand. They

admit the payment of the amounts as alleged, but deny that plaintiff had any claim or lien thereon. They aver that in some litigation pending in the Superior Court of Union County it was adjudged that the Union and Stanly County Branch had ceased to exist, and no such branch as the Union County Branch had been organized. That thereupon a new corporation was chartered and organized under the corporate name of "The Farmer's Mutual Fire Insurance Company of Union County." That said corporation had no connection with the defendant corporation or any of its branches, and is not successor thereto. They deny that they have ever attempted to defeat the payment of plaintiff's judgment. At the close of the evidence plaintiff withdrew his demand for a mandamus against the Farmer's Mutual Fire Insurance Association of North Carolina; defendants Phifer and McNeely moved for a judgment of nonsuit, which was allowed; plaintiff excepted and appealed.

Adams, Jerome & Armfield for the plaintiff.
Redwine & Stack for the defendant, McNeely.

CONNOR, J., after stating the case: Several interesting questions in regard to the right of the plaintiff to enforce the payment of his judgment by mandamus directed to the defendant corporation are eliminated by his course in withdrawing any demand therefor. When the appeal in the original action was before us, it appeared that the Union and Stanly County Branch, through which the policy was issued, had separated, and that the Union County Branch had assumed the liabilities of the original branch. We are not sure that we understand what is meant by the allegation in the answer that there was never any Union County Branch of the defendant corporation. We would be unwilling to think that the officers of the defendant corporation would issue to its members a policy of insurance for which no one, either individ-

ually or corporately, was liable. If so improbable a thing was done, the persons issuing the policy and receiving plaintiff's money upon assessments, would be liable for damages in another form of action. The record shows that while plaintiff's policy was in force, and after the division of the branch, assessments were levied upon and paid by the plaintiff to meet losses sustained "since the division of the Union and Stanly County Branch." The record contains several notices to plaintiff, issuing from the "Office of W. H. Phifer, President Union County Branch of the Farmer's Mutual Fire Insurance Association of North Carolina," signed by "James McNeely, Secretary and Treasurer," and marked "paid" by him. We presume that notwithstanding this testimony which causes us, as it is well calculated to cause others, to suppose that some one was responsible upon contracts made and for money paid pursuant to those notices, there is some legal reason why the Union County Branch was at all times a myth, with capacity to take in, but none to pay out money. After a second careful examination of the charter of this corporation, we are not sufficiently astute to perceive why some one, either corporate or natural, is not responsible to the plaintiff upon his contract, or for damages for inducing him to enter into it. The loss was adjusted by the duly appointed officers. His money was received both before and after the fire, and a jury have found every controverted fact in his favor. While it must be conceded that the organization of the defendant corporation is somewhat peculiar, we have discovered nothing in the record to cause us to change our opinion that the "Union Branch is liable to the plaintiff, and if the defendant fails or refuses to make the assessment, the plaintiff would be entitled to a mandamus compelling it to do so. The Union Branch is not a corporation, and is not a party to this action. The remedy must be worked out through the defendant corporation." *Perry v. Ins. Asso.*, 132 N. C., 283. The contract of insurance was with the de-

fendant corporation "through the Union and Stanly County Branch." The by-laws, put in evidence, provide that "it shall be the duty of the president of any branch of this association to sign all policies issued through said branch, and order all assessments after they have been properly adjusted." It cannot be that the law will permit persons to hold themselves out as officers of a corporation, make contracts, assume liabilities, receive money, etc., and avoid all responsibility by simply denying the existence of the corporation or the agency through which it professes to act. It is evident that the defendant corporation was organized for the purpose of affording persons residing in the county, an apportunity to insure their property at a low rate fixed by actual losses and small amount for expenses. It was not contemplated that the corporation should have any capital stock or surplus fund. The security of the member was to depend upon the prompt assessment upon, and payment by each member, of the amount necessary to pay the loss. The business was to be conducted by branches formed in the several counties, each branch being, in respect to its policies and losses, independent. This is all simple and plain, but the success of the plan is necessarily very largely dependent upon the good faith of the members and managers. It is well known that the parties are not experienced in the business of insurance, or the management of corporations. The courts have sought to sustain and enforce such contracts by looking to the substance and intention, rather than by adopting a technical or strained construction. Bacon's Benefit Soc., sec. 178. While it is not perfectly clear how the remedy for failure to levy and collect the assessment is to be worked out, we have no doubt that an order may be formulated which will enforce the discharge of duty imposed by the charter. Neither officers nor members of corporations can evade their plain duty to those with whom contracts are made, by dissolving the organization and leaving creditors

unprovided for. To permit this to be done would invite and encourage dishonesty and fraud. If the corporation has property, it is impressed with a trust for the benefit of creditors. If there are unpaid subscriptions to the stock, the courts enforce their collection and appropriation upon the same principle. *Foundry Co. v. Killian*, 99 N. C., 501. We do not doubt that in mutual insurance companies, amounts due upon assessments already made, or to be made to pay losses accrued, the same principle is applicable. It cannot be that where all the members have enjoyed the protection which membership affords, they can, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. 21 Am. & Eng. Enc. (2nd Ed.), 277. It is well settled that when several persons participate in the irregular organization of a corporation, they cannot avoid responsibility to its creditors by showing the invalidity of the organization. *Foundry Co. v. Killian, supra.* The plaintiff, however, waives, in this action, his remedy by mandamus and seeks to hold the defendants, Phifer and McNeely, liable personally. This claim is based upon two grounds: 1. That they paid to themselves, as commissions and salary, $126, and to B. D. Austin $223. The plaintiff is confronted with the objection that he has no claim upon this fund. It does not clearly appear how or from what source it originated. The right of each policy holder is to have an assessment made to pay his loss. It is from this source alone that he is to be paid. This is apparent from an examination of the by-laws, and the notices sent to each member, set out in the record. It therefore follows that the plaintiff had no claim upon or right to the amount paid Austin. If it was improvidently paid, the officers are liable to the corporation. 2. The plaintiff's next claim is that the defendants are liable personally for that they procured the dissolution of the Union Branch and the formation of a new company. As we have seen, the defendants, Phifer and McNeely, had no power to so dissolve the Union Branch

or withdraw its members from the corporation as to affect their liability to the plaintiff. They had a right, if they saw fit, to charter and organize a new corporation, and to prescribe the terms upon which members should be admitted or policies issued. This left the legal status of the plaintiff unimpaired. We cannot perceive how any cause of action accrued to the plaintiff by the formation of the new company. It does not appear that the new company took over any assets of the Union County Branch, and it expressly refused to assume any liability for plaintiff's judgment. So far as the record shows, the members of the Union Branch of the defendant company have never refused to pay plaintiff's judgment. They have never been called upon to do so by an assessment. We are of the opinion that the judgment of nonsuit was properly ordered. While we can see much practical difficulty in enforcing the payment of an assessment when made, we can see no reason why, by motion in the original cause, the plaintiff may not have an order directed to the defendant corporation to have the assessment made pursuant to its charter and by-laws. If the officers should refuse to discharge their duty, we do not doubt that power resides in the court to enforce its performance, or to appoint a receiver with directions to make and collect the assessment. If this is not so, the maxim, that there is no wrong without a remedy, is not true.

The judgment must be

Affirmed.

TROUSER CO. v. RAILROAD.

(Filed October 24, 1905).

Railroads—Liability for Baggage—Merchandise as Baggage — Insurer — Warehousman — Degree of Care Required.

1. If a railroad company receives for carriage, from a passenger, trunks containing merchandise or articles other than the personal baggage of the passenger, with knowledge of their contents, it is liable on its contract as an insurer for any loss of, or damage to the property, not resulting from the act of God or the public enemy.

2. While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault.

3. When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care.

4. Although a carrier has no knowledge of the contents of trunks, which contain samples, yet some care at least should be taken of the trunks after they arrive at their destination, and it has no right to leave them for three days on the platform of its depot exposed to the weather.

ACTION by Charlotte Trouser Co. against Seaboard Air Line Railway Co., heard by *Judge Walter H. Neal* and a jury, at the August Term, 1905, of the Superior Court of UNION County.

Action for injury to sample trunks. One J. D. Futch, plaintiff's traveling salesman, boarded, with defendant's per-

mission, one of its freight trains with a caboose, on which he had been accustomed to travel, at Wingate, for Monroe, and delivered at the same time to defendant, two trunks containing samples to be carried with him on said train to his destination. Futch paid his fare to the conductor, but nothing extra for the baggage. The train stopped at the freight depot in Monroe, which, defendant contended upon the evidence, was its usual stopping place where baggage carried on that train was received and delivered, though it appeared that the baggage room was in the passenger depot, not far away. The trunk was placed on the platform of the freight depot, and remained there from Friday, the day of arrival, until the next Monday. There was a rain Sunday at noon, which greatly damaged the samples. The transfer clerk at the freight depot, about an hour after the train arrived, promised Futch to take care of his trunks, and transfer them to the passenger depot, where he expected to get them the next Monday, as Saturday was a holiday, and he supposed that he could not get them on that day or Sunday. There was testimony tending to show that Futch delivered the trunks to the conductor of the train as baggage, and the latter knew what they contained. Issues were submitted as to negligence, contributory negligence and damages, to each of which the jury responded in favor of the plaintiff. After overruling a motion for a new trial, judgment was entered on the verdict, and the defendant appealed.

Redwine & Stack for the plaintiff.

J. D. Shaw and *Adams, Jerome & Armfield* for the defendant.

WALKER, J., after stating the case: It is settled by the great weight of authority, that if a railroad company receives for carriage, from a passenger, trunks containing merchandise or articles other than the personal baggage of the passen-

ger, with knowledge of their contents, it is liable on its contract as an insurer for any loss of, or damage to the property, not resulting from the act of God or the public enemy. *Railroad v. Swift*, 12 Wall., 262; *Railroad v. Bowler*, 57 Ohio St., 38; *Railroad v. Berry*, 60 Ark., 433; *Jacobs v. Tutt*, 33 Fed. Rep., 412; *Railroad v. Carrow*, 73 Ill., 348; *Railroad v. Conklin*, 32 Kan., 55; *Humphrey v. Perry*, 148 U. S., 627; *Railroad v. Hochstim*, 67 Ill. App., 514; *Oakes v. Railroad*, 20 Ore., 392. It is in such a case held to the full measure of its common law liability for the reason so well expressed by *Justice Field* in the case first cited: "If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed." The same case and many other authorities also establish the proposition that while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. *Oakes v. Railroad*, 20 Ore., 392; *Macrow v. Railroad*, L. R. 6 Q. B., 612; *Railroad v. Bowler*, *supra*. When the baggage has arrived at its destination, and has been deposited at the usual or customary place of delivery, and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. This newly arisen duty requires the company to place the baggage in a proper and suitable place, such for example, as a baggage room, and then to exercise ordinary care and diligence

in safely keeping it there, and, wherever the place of deposit may be, in seeing that the baggage is protected from injury by exposure to the weather, or by other cause. *Haegar v. Railroad,* 63 Wis., 100. If a railway company, without knowing their contents, receives from a passenger trunks to be carried over its line, which contain articles other than personal baggage, such as merchandise, some of the courts hold that while the company is not liable as a common carrier for any loss of or damage to the merchandise, it is bound by the law to the exercise of ordinary care in handling the trunks and for any loss or damage resulting from the failure to use such care, the company is liable to the passenger, it having assumed the relation to the property of an ordinary bailee, the duty of the latter being to take such care of the property as an ordinarily prudent man would of his own, under like circumstances, *Pennsylvania Co. v. Miller,* 35 Ohio St., 541; and other courts hold that the company is liable, as a gratuitous bailee, only for gross negligence, *Humphreys v. Perry,* 148 U. S., 627; *Railroad v. Carrow,* 73 Ill., 348; and still other courts hold that the passenger cannot recover at all, there being no contract as to any article not baggage, and no consideration paid for its carriage or its care, *Bluemantle v. Railroad,* 127 Mass., 322; although it was held by the same court, which decided *Bluemantle's case,* that it would undoubtedly be competent for a railway company to agree to transport, at its risk, merchandise by its train for the price of the ticket sold to the passenger. *Alling v. Railroad,* 126 Mass., 131. The subject is fully discussed and the authorities collated in 2 Fetter on Carriers of Passengers, secs. 587 to 614.

It clearly appears from the form of the issues, that the court below tried this case upon the theory that the defendant was liable, as a bailee, only for negligence, and not that it could be held to answer, as an insurer, by virtue of its common law liability as a carrier.

If care is required to be used by the company where the character of the articles is not disclosed, some difficulty is found in determining the exact measure of responsibility, because some courts have held that the negligence must be gross. It was said by *Baron Rolfe* (afterwards *Lord Cranworth*), in *Wilson v. Brett*, 11 M. & W., 113, that gross negligence is ordinary negligence with a vituperative epithet, and the court in *Railway v. Arms*, 91 U. S., 489, adopting the view of *Baron Rolfe*, which had been approved in *Beal v. Railroad*, 3 H. & C., 337, and *Grill v. Collier Co.*, L. R. 1 C. P., 600, said that "gross negligence" is a relative term, and is doubtless to be considered as meaning a greater want of care than is implied by the term "ordinary negligence," but, after all, it means the absence of the care that was necessary under the circumstances, or that it was the duty of the defendant to use. In this case, while the court refused to give the instruction asked by the defendant in its first prayer, it did give the one contained in the second prayer, which, with the general charge, sufficiently called upon the jury to find whether the defendant's conductor knew there were samples in the trunk; and we think the verdict, which should be read in the light of the evidence and the charge, clearly indicates that they did so find. The evidence in regard to this knowledge was positive and unequivocal. The witness Futch testified that he delivered the trunks to the defendant as baggage, and that the conductor knew what they contained. The conductor was not introduced as a witness, nor was there any evidence offered to contradict this statement. The defendant introduced no evidence at all. In the state of the proof, the judge would have been well warranted in charging the jury that, if they believed the facts to be as stated in Futch's testimony, they should answer the issues as to negligence and contributory negligence in favor of the plaintiff. If the defendant knew that the trunks contained samples, and nevertheless, received them as bag-

gage, it was certainly liable for any loss sustained, if, after the plaintiff had a reasonable time to claim and remove the trunks, it failed to take ordinary care of them. If it had no knowledge of their contents, we yet think that some care, at least, should have been taken of the trunks, and that as matter of law it had no right to practically abandon them, or leave them for three days on the platform of its depot building exposed to the weather. This was certainly not ordinary care, but in our opinion, was the very smallest degree of care, if care at all, that could have been exercised under the circumstances. The best considered cases, and the most numerous, bind us on the point that the defendant must have exercised some degree of care before it can be relieved of liability. In the view we take of it, there is no element of contributory negligence in the case. The only question is, did the defendant do its duty with reference to the care of the trunks, after they reached their destination at Monroe? and, upon the uncontroverted facts, we are of the opinion that it did not. There was no error committed by the court in the trial below.

No Error.

MABRY v. RAILROAD.

(Filed October 31, 1905).

Railroads—Negligence—Liability of Lessor—Fellow Servant Act—Master and Servant.

1. The North Carolina Railroad Company is responsible for actionable negligence of the Southern Railway Company done in the operation of the road under the former's lease, and in the exercise of its franchise.

2. One effect of the Fellow Servant Act (ch. 57, Private Laws, 1897,) is to abolish, so far as railroads are concerned, the doctrine known as the Fellow Servant Doctrine, and make the company responsible for the negligent acts of its employees in the course of their service or employment, when by reason of such negligence a fellow servant or other employee is injured.

ACTION by J. C. Mabry against North Carolina Railroad Company, heard by *Judge R. B. Peebles* and a jury, at the June Term, 1905, of the Superior Court of GUILFORD County.

This was an action to recover damages for personal injuries caused by the alleged negligence of the Southern Railway Company. The ordinary issues in actions for negligence were submitted. There was evidence of plaintiff tending to show that plaintiff, an employee of the Southern Railway Company, operating the defendant's road under a lease, while in discharge of his duty as such employee, was seriously injured by the negligence of two fellow servants, also in service of the same company, and so engaged at the time. There was evidence of defendant adverse to the claim of plaintiff. Verdict and judgment for plaintiff, and defendant excepted and appealed.

Stedman & Cooke for the plaintiff.
King & Kimball for the defendant.

HOKE, J. It has been settled by repeated and well considered decisions of this court, that defendant company is responsible for actionable negligence of the Southern Railway Company, done in the operation of the road under defendant's lease, and in the exercise of its franchise. *Aycock v. Railroad,* 89 N. C., 321; *Logan v. Railroad,* 116 N. C., 940; *Harden v. Railroad,* 129 N. C., 354. The Statute, chapter 56, Private Laws 1897, section 1, enacts: "That any servant or employee of any railroad company operating in this State, who shall suffer injury to his person, or the personal representative of any such servant or employee, who shall suffer death, in the course of his service or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company."

One effect of this statute is to abolish, so far as railroads are concerned, the doctrine known as the fellow servant doctrine, and make the company responsible for the negligent acts of its employees in the course of their service or employment, when by reason of such negligence, a fellow servant or other employee is injured.

We have carefully examined the record and the exceptions presented for our consideration, and find no reversible error in the charge of the court or the conduct of the trial.

The jury have accepted the version of the occurrence given by the plaintiff, and, taking this to be true, the plaintiff had a clear cause of action.

There is no error, and the judgment below must be

Affirmed.

BRAY v. INSURANCE CO.

(Filed October 31, 1905).

Fire Insurance—Iron Safe Clause Construed.

1. The provisions in the "Iron Safe Clause" of an insurance policy (1) That the assured shall make an inventory "within 30 days after the date of the policy" and (2) that he shall keep a set of books "from the date of the inventory as provided in the first section," are not violated where the fire occurred within 23 days and before any inventory was taken or set of books kept, as the assured has the full period of 30 days after the date of the policy to make the inventory and a like period within which to comply with the provision as to keeping a set of books, unless the inventory is sooner taken.

2. Where a clause in an insurance policy is ambiguously worded or there is doubt concerning its true meaning, it should be construed rather against its author than the assured, and any such doubt should be resolved in favor of the latter.

ACTION by A. J. Bray and another against the Virginia Fire and Marine Insurance Co., heard by *Judge G. W. Ward* and a jury, at the August Term, 1905, of the Superior Court of PERSON County. From a judgment for the plaintiffs, the defendant appealed.

Kitchin & Carlton for the plaintiffs.
Watson, Buxton & Watson for the defendant.

WALKER, J. This action was brought by the plaintiffs to recover the amount of a policy of insurance for five hundred dollars, issued to them on the 19th day of December, 1904, and by which the defendant agreed to insure their stock of merchandise from loss by fire. The only defense pleaded was that the plaintiffs had not observed and kept the provisions of what is known in such policies as the "Iron Safe Clause," in that they had not taken an inventory, or kept books as

therein directed. The clause in this policy is in the usual form, and requires of the assured: (1) That he shall take a complete itemized inventory of his stock on hand, at least once in each calendar year, and one shall be made within thirty days after the date of the policy, unless such an inventory has already been taken within the twelve calendar months next preceding said date, the policy to become null and void if the inventory is not taken, and the unearned premium to be returned on demand. (2) That he shall keep a set of books, which must clearly and plainly present a complete record of business transacted, including purchases, sales and shipments, for cash and credit, from the date of the inventory, as provided in the first section of the clause, and during the continuance of the policy. (3) That he shall keep such books and inventory securely locked in a fire-proof safe at night, and at all times when his building is not actually open for business, or, failing in this, in some place not exposed to a fire which would destroy the building.

In the event of failure to produce such set of books and the inventory for the inspection of the company, the policy to become void, and such failure to be a perpetual bar to any recovery thereon.

We have reproduced the material portions of the clause, as the decision of the case must turn upon its true construction. The counsel for the defendant, in an able argument, and well prepared brief, maintained that the clause in question is a valid one, as containing a promissory warranty, which if not complied with, will defeat a recovery upon the policy, and a large majority of the courts, it seems, have so held, but we do not deem it necessary to enter upon a discussion of the proposition, or to undertake to decide the same, as the validity of the clause was not seriously contested by counsel for the plaintiffs who presented his case with unusual force and clearness, and distinctly placed the plaintiffs' right to recover upon the ground that by a fair interpretation

of the clause, when considered in connection with the facts of the case, they had not, in any particular, violated its provisions. We will therefore assume, for the sake of the argument and without deciding the question, that the clause is valid as a whole, and in each and every part, and proceed to examine the case upon that hypothesis.

The clause first provides for the making of an inventory within thirty days after the date of the policy. It appears in this case that none had been made prior to that time. The fire occurred on January 11, 1905, just twenty-three days after the policy was issued by the defendant, so that the full time allowed to the plaintiffs for preparing the inventory, had not expired by seven days. So far there was not much, if any, dispute between counsel as to the proper construction of the clause. They did differ widely as to the true intent and meaning of the second section. Counsel for defendant contended that the books are required by that section to be opened and kept from the date of the policy, while counsel for plaintiffs insist that by the explicit terms in which the provision is couched, they are required to be opened and kept only "from the date of the inventory, as provided for in the first section of the clause," and as, by the first section, the assured have the full period of thirty days after the date of the policy to make the inventory, it logically follows that they must have a like period within which to comply with the provision as to keeping a set of books, unless the inventory is sooner taken. It seems to us perfectly clear that in this contention, the plaintiffs' counsel must be right. If the requirement that books shall be kept is to be effective only from the date of the inventory, and it is expressly so stated in the contract of insurance, the plaintiffs could not be in default as to this provision, until either the inventory was actually taken, or until the time for taking it had expired; for, until the happening of the first event, namely, the completion of the inventory, the time had not arrived when they were re-

quired to open a set of books, and, until the expiration of thirty days from the date of the policy, it could not be determined when the inventory would be taken, if at all, and consequently the provision as to keeping books was not in force. The most that can be said in behalf of the defendant is that, during the thirty days succeeding the date of the policy, the duty of keeping books was, so to speak, in a state of abeyance or suspension, awaiting the happening of the event upon which it depended. It may well be asked, how could the plaintiffs keep books, showing the transactions in their store from the date of the inventory, until such an inventory had been taken? If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. *Grabbs v. Ins. Co.*, 125 N. C., 389. This is the rule to be adopted for our guidance in all such cases, and one reason, at least, for it is that the company has had the time and opportunity, with a view to its own interests, to make clear its meaning, by selecting with care and precision language fit to convey it, and if it has failed to do so, the consequences of its failure should not even be shared by the assured, so as to deprive him of the benefit of the contract, as one of indemnity for his loss. But we entertain no doubt as to what the parties meant, and the conclusion we have reached, is fully sustained by the well considered opinion of the court in *Insurance Co. v. Waugh*, 60 Neb., 348, wherein it is said: "Under any ordinary and fair rule of construction, the assured was not required to keep books of account until the inventory had been taken, and thirty days were given in which to perform that act. The fire oc-

curred within less time. There existed no legal obligation on the assured to preserve books of account in a fire-proof safe, or other place secure from fire, in said building until the expiration of the time in which an inventory was to be taken." This language was used with reference to a policy having the same phraseology as the one in this case. In another case the same court, construing a policy which required an inventory to be taken at least once a year, and after fully discussing the question raised, said: "The time, therefore, for taking an inventory of the stock of goods insured, did not expire until a year after the policy was written, and as the loss occurred in less time, no default in this condition, or any condition dependent thereon, is shown or can rightfully be claimed." *Insurance Co. v. Jeary*, 60 Neb., 338. This is the pivotal and decisive question in the case, and as our opinion upon it is against the defendant, it follows that the plaintiffs were entitled to recover the amount of the policy, and there was consequently no error in the charge of the court to the jury, that if they found the facts to be in accordance with the plaintiffs' evidence, they should return a verdict upon the issue, in their favor.

No Error.

WILSON v. TELEPHONE CO.

(Filed October 31, 1905).

Stock and Stockholders—Sales—Tender—Mandamus.

1. Where the plaintiff's stock in the defendant company was advertised for sale for failure to pay a certain amount due thereon, and the plaintiff before the sale tendered the secretary of the company in cash more than said amount and told him he would tender more if that was not enough, and the secretary did not allege that any more was due, but simply declined to accept payment, *held,* this was a legal tender and the subsequent sale of the stock was void.

2. Where the plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest to the date of tender and cost of advertisement.

ACTION by J. P. Wilson against the Duplin Telephone Co. for a writ of mandamus from the Superior Court of DUPLIN County, heard by *Judge W. B. Councill,* at Chambers, in Kenansville, on the 6th day of September, 1905. From a judgment for the plaintiff, the defendant appealed.

F. R. Cooper and *G. E. Butler* for the plaintiff.

Stevens, Beasley & Weeks and *Shepherd & Shepherd* for the defendant.

CLARK, C. J. The court below finds as facts: That the plaintiff had subscribed for a $25 share of stock in the defendant company, and paid thereon $12.50; that on 16 June, 1905, the balance due with interest was $14.78, which the plaintiff did not pay when called for, whereupon on said day, by a resolution of the board of directors, the stock was advertised for sale. As soon as the plaintiff had notice of such advertisement, he tendered the secretary of the defendant company $15 in cash, and told him he would tender more

if that was not enough, that he had plenty of money with him to pay it, and demanded the share of stock. The secretary did not allege that any more was due, but simply declined to accept payment. Upon this, His Honor held properly that there was a legal tender (*Smith v. B. & L. Asso.*, 119 N. C., 260; *Blalock v. Clark*, 133 N. C., 308), and that the subsequent sale of the stock was void. It seems that the president of the company was present at the sale, as the court finds that he was not present "in that capacity;" the purchaser afterwards transferred the share of stock to the president, individually for full value.

It is true that the plaintiff might have bought this stock at the sale and avoided the necessity of this action, as any surplus of his bid over the amount due by him on the stock would have gone to himself, and it is true that he might have brought suit for damages, but he could elect to treat the sale as a nullity, and ask that the company be directed to issue the certificate of stock to him upon payment of the balance due by him for balance due on stock ($12.50) with interest to the date of tender and cost of advertisement to that day (but not cost of sale), as asked in his complaint, which avers his readiness to pay said sum.

There was evidence tending to show tender, and the finding of fact is conclusive. The sale thereafter was wrongful, and no title passed to the purchaser. The company having issued to him a share of stock without authority, his remedy would be against the company to recover back the purchase money and interest, but as he has since sold said unauthorized certificate to the president of the company, the rights of the latter can doubtless be adjusted between him and the company without suit.

The plaintiff is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount above stated.

No Error.

PROPST v. RAILROAD.

(Filed October 31, 1905).

Railroads—Venue of Actions—Removal Under Act 1905—Provisos Construed.

1. Chapter 367, Acts 1905, amending section 192 of The Code, with reference to the place of trial of actions against railroads, applies to all railroads, both domestic and foreign.

2. While a proviso relates generally to what immediately precedes it, and is confined by construction to the subject matter of the section of which it is a part, yet if the context requires it, the proviso may be construed as extending to and qualifying other sections or even as being tantamount to an independent provision, the main object being to enforce the will of the Legislature as it is manifested by the entire enactment.

3. The amendment of 1905 does not repeal section 194, but the latter will be confined to corporations, other than railway companies, which have been chartered by any other State, government or country.

ACTION by J. L. Propst against the Southern Railway Company, heard by *Judge R. B. Peebles,* at the April Term, 1905, of the Superior Court of GUILFORD County, upon a motion of the defendant to remove the action under chapter 367 of the Acts of 1905. From the order of removal, the plaintiff appealed.

John A. Barringer and *J. T. Morehead* for the plaintiff.

King & Kimball and *A. B. Andrews, Jr.,* for the defendant.

WALKER, J. This action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant, a non-resident corporation, was brought by the plaintiff in the Superior Court of Guilford County. The

defendant moved that the place of trial be changed to Rowan County, where it was found, as a fact, the plaintiff resided and the cause of action arose. The court ordered the case to be removed for trial to said county, under chapter 367, Acts 1905, amending section 192 of The Code. That section provides for the trial of actions in the county where the plaintiffs or the defendants, or any of them reside, and if none of the defendants resides in the State, then in the county in which the plaintiffs or any of them reside, and if none of the parties resides in the State, then in the county designated by the plaintiff in the summons and complaint, subject, however, to the power of the court to change the place of trial as provided by law. The section was amended by the Act of 1905, chap. 367, as follows: "Provided that in all actions against railroads, the action shall be tried either in the county where the cause of action arose, or in the county where the plaintiff resided at the time the cause of action arose, or in some other county adjoining the county in which the cause of action arose, subject, however, to the power of the court to change the place of trial in the cases provided by the statute."

The plaintiff's counsel contended that the proviso enacted in 1905 applies only to corporations residing in the State, and that as the defendant is a non-resident corporation, it does not come within either the words or the intent of the proviso, and consequently, actions against it must be brought and tried in accordance with the provisions of section 194 of The Code, relating to suits against non-resident or foreign corporations, which section requires such actions to be brought in the county in which the cause of action arose, or in which the corporation has property, or usually does business, or in which the plaintiff resides.

We do not think this is the proper construction of the proviso, and it seems to us that if it should be so interpreted, the clearly expressed intention of the Legislature would be defeated. It is our duty in construing a statute, to ascertain

from its words, if possible, the meaning which the Legislature intended it should have, and when the intention is thus ascertained, it must always govern.

The general office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, and usually it is not permitted to enlarge the meaning of the enactment to which it is appended, so as itself to operate as a substantive enactment. It relates generally to what immediately precedes it and is confined by construction to the subject matter of the section of which it is a part. These rules are, however, not absolute and, after all, if the context requires it, the proviso may be construed as extending to, and qualifying other sections or even as being tantamount to an independent provision, the main object being to enforce the will of the Legislature, as it is manifested by the entire enactment. 26 Am. & Eng. Enc. (2nd Ed.), 678, 679. The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso, the intention expressed being paramount to form. 2 Lewis's Sutherland on Stat. Const. (2nd Ed.), p. 673, sec. 352 (223); *Bank v. Mfg. Co.*, 96 N. C., 298; *Railroad v. Smith*, 128 U. S., 174. In *Bank v. Mfg. Co., supra,* this court says: "While it is a general rule in the construction of statutes to consider a proviso as a limitation upon the general words preceding and (as) excepting and taking out something therefrom, the rule is not absolute, and the meaning of the proviso must generally be ascertained from the language used in it." That case affords a striking illustration of the principle and seems to be a direct authority for the position that the proviso of 1905 may operate independently if the intention to give it that effect is sufficiently indicated, which we will now consider.

Giving to the language of the Act of 1905, its ordinary meaning, we are unable to avoid the conclusion that the pur-

pose was to extend its provisions to all railroads, both domestic and foreign. The words are broad and comprehensive. They embrace "all actions against railroads," and this means nothing less than that wherever a railroad is defendant, it shall be entitled to the benefit of the act, without regard to its residence, and this is so because there is nothing to restrict the meaning to resident railroads. The very fact that the proviso was added to section 192 is additional evidence, if any is required, of the intent of the Legislature. That section provides for the place of bringing and trying actions against both resident and non-resident defendants, and it was meet and proper, therefore, that a proviso, if intended to apply to both classes of corporations, resident and non-resident, should be annexed to that section and not to section 194, which applies only to non-resident or foreign corporations. We think also that the spirit of the law shows the correctness of our conclusion. It is a wise provision which requires an action of this kind to be tried in the county where the cause of action arose or where the plaintiff resides, instead of being in its nature purely transitory, so that it can be brought and tried in any county where it has property or transacts business, though it may be far distant from the place where the cause of action arose, and where perhaps all the parties and witnesses reside. It saves cost and expenses, and subserves the convenience of those interested, without imposing any hardship on the plaintiff. While not exactly so, the proviso is to some extent in accordance with the spirit of the ancient law which required, even in transitory actions, not the venue to be laid, but the trial to be had in the vicinage or neighborhood where the injury is alleged to have been done. 3 Blk. Com., 294. But it is useless to argue the matter any further, as the language of the proviso is plain and explicit, and we must declare the law to be as it is clearly written in the statute. We have no doubt whatever that the Legislature intended to

place the two classes of corporations on the same footing in respect to the venue or place of trial.

If this case were not within the letter of the statute, as we think it is, it is surely within the intention, and whatever is within the intention is as much within the statute as if it were within the letter.

Our decision does not have the effect to repeal or annul section 194, as suggested by the plaintiff's counsel. The two sections, under our construction of the proviso of 1905, can well stand together and each have full operation within its own appointed sphere. Section 192 will apply to all classes of plaintiffs and defendants, as it did at the time the proviso was adopted, and the latter will apply to railroad corporations generally; while section 194 will be confined to corporations, other than railway companies, which have been chartered by any other State, government or country. In this way the two sections may easily be reconciled and each be permitted to operate, and when effect can thus be given to both enactments, it is enjoined upon us, by an elementary canon of construction, to adopt the meaning which will produce this result.

We can see no reason why the ruling of the court was not correct.

No Error.

BIDWELL v. BIDWELL.

(Filed October 31, 1905).

Divorce—Validity of Decree—Domicile—Jurisdiction—Action for Support—Estoppel—Consent Judgment.

1. In an action for divorce, where neither party has a domicile in the State of the forum, such court having no jurisdiction of the subject matter of the controversy, a decree of divorce is void, though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court.

2. Where an action for divorce is instituted and the decree obtained in the State of the plaintiff's domicile, and the defendant has been served with process within the jurisdiction of the forum, or has voluntarily appeared and answered, a decree in such case is valid both *in rem* and *in personam* and will bind and conclude the parties everywhere.

3. In an action for support under section 1292 of The Code, a judgment of nonsuit was proper, where it appeared that the plaintiff, who was at that time domiciled in Massachusetts, brought a suit in that State to obtain an absolute divorce from the defendant, who appeared and answered and set up a decree of absolute divorce of a North Dakota court in bar of the plaintiff's demand, and that the Massachusetts court, after full hearing, dismissed the suit on the ground that the North Dakota decree was valid, and that the status of the parties was not that of husband and wife.

4. Where the validity of a divorce had been established by a decree of a competent court, having full jurisdiction in the cause, the plaintiff is estopped from setting up defenses which have been or could have been passed upon and determined in that cause.

5. Where the record discloses that a case was conducted throughout as an adversary proceeding, and judgment was entered after full and due inquiry into the facts, the decree is not a consent degree.

ACTION by Ella J. Bidwell against Geo. H. Bidwell, heard by *Judge Walter H. Neal* and a jury, at the February Term,

1905, of the Superior Court of WAKE County. From a judgment of nonsuit, the plaintiff appealed.

This was a civil action under section 1292 of The Code, to recover for support and maintenance of plaintiff and her minor child. Plaintiff alleged that plaintiff and defendant were man and wife; that defendant had unlawfully abandoned plaintiff, and failed to provide reasonable subsistence for plaintiff and her minor child, though fully able to do so.

Defendant answered, denying that he had wrongfully deserted plaintiff; charged the separation to plaintiff's own conduct, and further set up the record, proceedings and decrees of two courts—one in North Dakota, in which the present defendant was awarded an absolute divorce, and the second, a record and decree of Massachusetts in which the present plaintiff sued the present defendant for absolute divorce, and in which there was a decree that the divorce granted in the North Dakota court was valid and binding, and that plaintiff and defendant did not hold the relationship of man and wife, and set up these two records and decrees as an estoppel in bar of relief.

Plaintiff replied to the answer, and averred that the decree of divorce granted by the court in North Dakota was null and void, and should be so held, because at the time of the institution of said suit, and proceedings and decree therein, neither plaintiff nor defendant had any *bona fide* domicile in North Dakota, "but that defendant had gone to said State with no intent or purpose of becoming a resident, or acquiring a *bona fide* domicile therein, but with the sole purpose of obtaining, by fraud and secretly, a divorce from plaintiff." Further replying, plaintiff averred that the plaintiff was forced by stress of want and dire necessity, being penniless, friendless, homeless and in a strange land, either to accept such terms as the present defendant might dictate, or go hence in destitution for herself and infant child, and under and by virtue of

this hard duress from a necessity from which there was no escape, she took the money he agreed to give her.

There was evidence to the effect that the present plaintiff had appeared and answered in the suit in North Dakota; that the decree of divorce was entered after investigation had; and the plaintiff in this suit had been awarded and paid $10,000 as a full and reasonable allowance for the care, education and maintenance of her minor child.

It further appeared that at the time of the institution of the suit in Massachusetts, by the present plaintiff, and pending the proceedings therein, the said plaintiff was a citizen, resident and domiciled in Massachusetts, and the defendant had appeared and answered to the libel filed in the cause.

The record of findings of fact and conclusions of law, in which the decree of absolute divorce was awarded in the North Dakota suit, are as follows:

1. That plaintiff now is, and at all times since more than ninety days preceding the commencement of this action, has been in good faith a resident of North Dakota, and that defendant is a resident of Springfield, Mass., but is now in this State.

2. That plaintiff is now about twenty-six years of age, and defendant is now about twenty-nine years of age.

3. That on December 9, 1890, plaintiff and defendant were married, and that said marriage has never been annulled or dissolved.

4. That there are two children, living issue of said marriage between plaintiff and defendant herein, to-wit: Mary Beulah, a girl four years of age, and Maud, a girl two years of age—the former of which is in the custody of the plaintiff, and the latter in the care and custody of the defendant.

5. That plaintiff and defendant lived together after their said marriage as husband and wife, until about the month of December, 1893, at which last mentioned time they separated and have lived separate and apart ever since.

6. That this is an action for divorce, and that this court has full jurisdiction of both the parties thereto, and of the subject matter of the action.

7. That defendant, as appears from the proofs herein, has been, and is, guilty of wilful desertion of the plaintiff, and that such desertion, as shown by the proofs herein, is cause for full and absolute divorce under the laws of this State.

8. That the true and best interests of the parties, and of the minor children of the parties, all require that the custody of said minor child, Mary Beulah, be awarded to and confirmed in the plaintiff; and the custody of said minor child, Maud, be awarded to and confirmed in the defendant.

9. That from the proofs as they appear herein, the sum of ten thousand dollars is a fair, reasonable and just sum to be paid by the plaintiff to the defendant for the support, care, custody, maintenance and education of said minor child, Maud, and that the decree herein should require plaintiff to pay said sum to defendant in that behalf. But, and the decree shall so provide, the payment of said ten thousand dollars shall be in full discharge of all obligations of the plaintiff to the defendant, including not only in behalf of said minor child Maud, but also in full discharge of all obligations from him to her, of or on account of alimony, support, money, rights of dower, if any, and any and all other obligations whatever, except there be reserved to the said defendant her right of dower, if any she have, in a certain farm in the State of North Carolina, called and known as the "Moore farm," near Franklin, in the County of Macon, in said State, formerly owned by plaintiff.

10. That justice to the parties require, and that the decree shall so provide, that each of the parties may visit the child in the care and custody of the other, at reasonable times and places: provided in that behalf, however, that when defendant desires to visit the said minor child, Mary Beulah, she shall not be required to do so at the home of the plaintiff's

parents or relatives, but may do so at the house of some disinterested friend, and with such child in the then temporary custody of such disinterested friend or of the plaintiff.

Let judgment be entered herein in conformity with the foregoing, by the clerk of the District Court, etc. (Signed by W. S. Lauder, judge, etc., September 20, 1895).

And the proceeding and decree in the libel for divorce entered in Massachusetts are as follows:

Respectfully libels and represents Ella J. Bidwell, of Springfield, Mass., that she was lawfully married to Geo. H. Bidwell, now of Culasaja, in North Carolina, at Walhalla, in South Carolina, on the 9th day of December, 1890, and thereafterwards your libellant and the said Geo. H. Bidwell, lived together as husband and wife in this Commonwealth, to-wit: at Chester, in said county, and that your libellant has lived in this Commonwealth for five years last preceding the filing of this libel; that your libellant has always been faithful to her marriage vows and obligations, but the said Geo. H. Bidwell, being wholly regardless of the same, at Culasaja, in North Carolina, on Friday, the 1st day of December, 1893, or thereabout, without just cause, wilfully and utterly deserted your libellant, which desertion has continued for three consecutive years, next prior to the filing of this libel: Wherefore your libellant prays that a divorce from the bonds of matrimony may be decreed between your libellant and the said Geo. H. Bidwell, and that the care and custody of Maud Bidwell and Beulah Bidwell, both minor children of said libellant and libellee, be decreed to said libellant and such other relief as to your Honors shall seem meet and as justice may require. (Signed Ella J. Bidwell, February 4, 1902).

The foregoing libel was entered in the court on the 10th day of February, 1902, when the libellant appeared by her attorneys, Bates & Arrington, and the libellee appeared by his attorney, E. H. Lathrop; and on the back of said libel is the following acceptance of service: "I accept service of this

precept; and appear for the libellee, reserving all rights." (Signed E. H. Lathrop, attorney for libellee, February 10, 1902).

And on March 19, 1902, the libellee filed his answer as follows: "The libellee denies each and every allegation in the libel except said marriage, and that he neither denies nor admits, but leaves the libellant to prove. If the libellant shall prove said alleged marriage, the libellee alleges that he was divorced from the libellant by the District Court of Cass County, State of North Dakota, a court of competent jurisdiction, and having jurisdiction of the cause and both parties thereto, prior to the beginning of this libel, to-wit: September 21, 1895, and which decree of divorce is in full force and effect, and was at the time of bringing this libel. The libellee further says that the libellant has brought two libels against him, prior to this one, in which said divorce has been pleaded, all of said proceedings being in this county, and of record here; that last proceeding was filed in this county, April 12, 1897, and was dismissed January 6, 1902; that said libellee therein pleaded said divorce granted to him as aforesaid in North Dakota, and your libellee says that the issue in this case has been adjudicated in this court, and the libellant is barred from proceeding in this action thereby, and from being granted divorce as prayed for. (Signed by E. H. Lathrop, attorney for libellee).

On March 25 there was a full hearing of the evidence, and on March 26 the following decree was filed in the case in the Massachusetts court: "This case came on to be heard on Tuesday, March 25, 1902, before *Mr. Justice Maynard,* both parties appearing by their respective counsel (naming them); now it appeared upon the hearing of said cause, that prior to the bringing of this libel, to-wit: September 20, 1895. the said libellee in the above entitled action, the said Geo. H. Bidwell, was divorced from the said libellant, the said Ella J. Bidwell, by the District Court, for the Third Judicial Dis-

trict of North Dakota, for a cause of divorce recognized in said North Dakota and in this Commonwealth, said District Court having had jurisdiction of both cause and parties, both parties appearing therein personally, and by counsel, and the libellee having filed an answer to said libel; and it further appeared that neither before nor since the filing of this libel was the said Geo. H. Bidwell an inhabitant of this Commonwealth: It is hereby decreed and determined that this libel is hereby dismissed, and that said decree of divorce, granted by said District Court of North Dakota, and pleaded herein, is a good and valid divorce in this Commonwealth, and that the parties are concluded thereby. We hereby assent to this decree." (Signed by counsel of both parties, and certified by the clerk of the court).

The jury having been empaneled and the above records presented, further proceedings were had as follows: "This cause coming on to be heard after the introduction of the exemplified copies of the records and decrees in the case of Geo. H. Bidwell against Ella Bidwell, rendered in the court of North Dakota, as alleged in the answer, and the records and decrees in the case of Ella J. Bidwell against Geo. H. Bidwell, rendered in the Superior Court of Hampden County, Massachusetts, the plaintiff offered testimony tending to prove that the defendant went to North Dakota, not intending to become a resident of that State, and testimony tending to prove the other matters alleged in the replication: Thereupon the court intimated to the counsel for plaintiff, that he would charge the jury that the plaintiff was estopped by the Massachusetts decree, notwithstanding the matters alleged in the replication touching the validity of the North Dakota decree, and in deference to that intimation the plaintiff submitted to a judgment of nonsuit, and appealed."

Argo & Shaffer and *Douglass & Simms* for the plaintiff.

Busbee & Busbee and *Shepherd & Shepherd* and *Jones & Johnston* for the defendant.

HOKE, J., after stating the case: On the facts presented for our consideration, the right of the plaintiff to the relief demanded, depends on whether the plaintiff and defendant are now husband and wife. *Skittletharpe v. Skittletharpe*, 130 N. C., 72. It will be noted that the plaintiff in her reply assails the validity of the North Dakota decree, first for lack of jurisdiction, and second, for that the same was obtained by fraud and duress. But no such impeaching allegations are made against the proceedings and decree of the court of Massachusetts. This being true, we are of opinion that the latter decree conclusively determines that the plaintiff and defendant are no longer husband and wife, and that the plaintiff has therefore no right to further support from the defendant.

It is accepted doctrine that so far as the subject matter of the controversy is concerned, actions for divorce deal with the status of the parties, and that jurisdiction in such actions is dependent upon the domicile of the parties at the time the decrees are rendered. Where neither party has a domicile in the State of the forum, such court having no jurisdiction of the subject matter of the controversy, a decree of divorce is void, though both parties may have appeared, and voluntarily submitted themselves to the jurisdiction of the court.

Where the plaintiff only is domiciled in the State of the forum, and has obtained a decree of divorce for a cause recognized as valid in such State, after constructive service of process on the defendant, according to the course and practice of the court, there has heretofore been diversity of opinion as to the extent and binding force of such a decree in other jurisdictions. North Carolina has heretofore held against the validity of such a decree by the courts of other States, as affecting the status of her own citizens. The better doctrine, however, now seems to be that where the domicile of the plaintiff has been acquired in good faith, and not in fraud or violation of some law of a former domicile, a divorce

of this kind should be recognized as binding everywhere—certainly within the jurisdiction of the United States or any one of them. *Atherton v. Atherton*, 181 U. S., 155; *Andrews v. Andrews*, 188 U. S., 14.

The case of *Atherton v. Atherton* does not establish the proposition here stated, on precisely similar facts to the case before us, or it would be controlling; but the general tenor of the decision would seem to favor this conclusion.

Where, however, the action is instituted and the decree obtained in the State of the plaintiff's domicile, and the defendant has been served with process within the jurisdiction of the forum, or has voluntarily appeared and answered, all the decisions are agreed that a decree in such case is valid both *in rem* and *in personam*, and will bind and conclude the parties everywhere. *Jones v. Jones*, 108 N. Y., 415; *Arrington v. Arrington*, 102 N. C., 491. The proceedings and decree of the court of Massachusetts are of the latter character.

It is admitted or established that the plaintiff in that suit, as she is in this, was at the time, and still is, resident and domiciled in the State of Massachusetts. Her libel was for the purpose of obtaining an absolute divorce from the defendant. He appeared and answered, and set up the proceedings and decree of the North Dakota court in bar of the plaintiff's demand. The Massachusetts court, after full hearing, dismissed the libel on the ground that the North Dakota decree was valid, and that the status of the parties was not that of husband and wife.

There is no allegation or claim that the court which rendered this decree is without jurisdiction, or that the same was obtained by fraud. The investigation and decree necessarily passed upon and determined the very questions involved here. The court had jurisdiction both of the cause and the parties, and the conclusion is not open to further investigation.

True, the case on appeal states that the plaintiff was ready to produce testimony that the defendant never had any domicile in North Dakota, and that such court was without jurisdiction, and that the decree of the Dakota court was obtained by fraud and duress. The answer is that the validity of the divorce has been established by a decree of a competent court, having full jurisdiction in the cause, where the very questions she now seeks to raise, had been, or could have been, passed upon and determined, and that the plaintiff is thereby estopped from further question concerning them. *Jenkins v. Johnston,* 57 N. C., 149; *Tuttle v. Harrill,* 85 N. C., 456; *McElwee v. Blackwell,* 101 N. C., 192; *Thurston v. Thurston,* 99 Mass., 39; *Hood v. Hood,* 110 Mass., 463; *Brady v. Brady,* 160 Mass., 258; *Cromwell v. County Sac.,* 94 U. S., 351.

It is suggested that the decree of the Massachusetts court is a consent decree, and for that reason is not binding or conclusive between the parties in actions of this character. The question, however, does not arise on this record, for we are clearly of opinion that this is not a decree by consent. The entire record discloses that the case was conducted throughout as an adversary proceeding, and judgment was entered after full and due inquiry into the facts. Our decision of the cause is in accord with the general equities of the case, as indicated by the course of events and the conduct and present status of the parties.

The plaintiff having appeared and answered, in the suit in North Dakota, receives $10,000 awarded her in that case for the care and custody of her minor child. After a delay of six and a half years, she institutes her own suit for divorce in Massachusetts, which is determined against her, and in which she is awarded thousand dollars by way of allowance. Again, after considerable delay, in apparent acquiescence, she brings this suit, seeking further allowance for support. The defendant, in the meanwhile, in reliance on

the decrees of two courts—one of them certainly having full jurisdiction of both cause and parties—has married another woman, and had a child born to him by this marriage.

Apart from the estoppel by record on the principal question, there is strong authority for holding that the plaintiff is estopped by conduct *in pais* from asserting any further claim for pecuniary allowance against the defendant. *Nichols v. Nichols,* 25 N. J. Eq., 60; *Mohler v. Shank,* 93 Iowa, 273; *Bailey v. Bailey,* 44 Pa. St., 274. There should be an end to this litigation. The defendant may well invoke for his protection the maxim, *Nemo debet bis vexari pro una et eadem causa.*

We hold that there was no error in the ruling of the court below.

No Error.

GLENN v. COMMISSIONERS.

(Filed October 31, 1905).

County Commissioners—Public Bridges—Ultra Vires Acts—Mandamus to Repair Bridge—Injunction to Restrain Erection of Bridge.

1. A Board of Commissioners has no power to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge.

2. Where a citizen at his own expense constructed a bridge and opened up the public roads over his lands leading to the bridge on both sides of the river and the board of commissioners accepted said bridge as a public bridge and have kept it in repair ever since, the fact that the commissioners paid him only a part of the cost of its construction did not change its character as a part of the public highway, subject to the control of the commissioners, as all other bridges in the country.

3. The plaintiff is not entitled to a mandamus commanding the board of commissioners to repair the bridge.

4. A citizen is not entitled to an injunction restraining a board of commissioners from proceeding to erect a bridge across a river at a certain point, though there is no public highway leading to such point, where the court finds that the board has in contemplation, the opening of a public road to such point, and that arrangements have been made for that purpose.

5. The order in which work upon the public highways is to be performed is within the sound discretion of the county commissioners and a finding by the court that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of the people of the county, excludes any interference by the courts.

ACTION by E. F. Glenn against Board of Commissioners, pending in the Superior Court of MOORE County, heard by *Judge Walter H. Neal,* at Chambers, at Monroe, on the 28th day of August, 1905.

This is an action prosecuted by plaintiff in his individual right, and as a tax payer of Moore County, for the purpose of having a mandamus directed to the defendant board of commissioners, commanding it to repair a public bridge over Deep River, and an injunction restraining said defendant from erecting another bridge over said river, some distance below the present one. The cause coming on to be heard before *Judge Neal* upon an order to show cause, he found the following facts:

"That about the year of 1882 or 1883, a bridge was constructed over Deep River in Moore County, at Glenn's Mill.

That Dr. R. W. Glenn, the father of the plaintiff, constructed the said bridge at a cost of about $4,000.

That after the construction of the said bridge, the Board of Commissioners made an order in favor of the said Dr. R. W. Glenn, on the treasurer of the said county, for the sum of $1,250.00 toward the amount expended for the erection of the said bridge.

That at the time of the building of the bridge aforesaid, and the issuing of the order aforesaid, the said Dr. R. W. Glenn was the owner of the lands on both sides of the river at the place where the said bridge was constructed.

That at the time of the construction of the said bridge and the issue of the said order, or shortly before or after said times, the said Dr. R. W. Glenn opened up the public roads over his said lands leading to the bridge on both sides of the said river, and the said board accepted said roads as public roads, and have used and worked the same as public roads ever since.

That since the said time the public has used the said bridge.

That the plaintiff is now the owner of the lands referred to as owned by Dr. R. W. Glenn, on both sides of the river, having acquired ownership as one of the heirs of Dr. R. W. Glenn, and by purchase from the other heirs.

That the plaintiff is a freeholder of the county of Moore, and a tax payer therein.

That the proposed new bridge contracted for by the defendant board is about one-half mile from the old bridge at Glenn's Mill.

That after the building of the said bridge, and after it had been received as a public bridge by the Board of Commissioners of Moore County, the said Dr. R. W. Glenn, the plaintiff and the co-owners of the property, as set forth in the complaint, constructed the buildings on their real property, on both sides of the river at Glenn's Mill, and made the improvements alleged in the complaint, or some of them.

That the buildings were constructed and the improvements made with reference to the said contract and the bridge at Glenn's Mill.

That a failure to keep the bridge in repair at Glenn's Mill will damage the plaintiff in his property.

That the bridge so constructed at Glenn's Mill in 1882 or 1883, became the property of the county.

That the Board of Commissioners since that time made frequent repairs on said bridge.

That the Board of Commissioners of Moore County, upon complaint made as to the condition of said bridge, appointed a special committee to examine said bridge and report to the board, and that said committee made the report attached to the answer of said board, marked Exhibit "A" and made a part thereof.

That thereafter the commissioners of said county made personal examination of the site of the old bridge, and the site of the proposed new bridge and the other sites, and thereafter, on the 3rd day of July, 1905, made the order attached to the complaint, marked Exhibit "A."

That on the 3rd day of July, 1905, the defendant entered into the contract attached to the answer, Exhibit "C."

That the Board of Commissioners of Moore County has found the facts: (1) That the construction of a bridge over Deep River, at a point near Glendon, in Moore County, is a public necessity. (2) That the proper site for said bridge is at the Hancock old bridge site, near the Tyson place.

That the old bridge at Glenn's Mill is out of repair.

That it is not the intention of the Board of Commissioners to discontinue the public roads leading to Glenn's Mill.

That there is no public road in use leading to the site which has been selected for said bridge, but said board has in contemplation the opening of public roads to and from said bridge; that the owner of the property on the north side of said bridge has agreed with said board to donate to the county sufficient land for the construction of a road to said bridge, and that arrangements have been made for the construction of said road without expense to the county. That on the south side of the river there is a distance of perhaps 150 yards, between the site selected and the public road, and

that a petition has been filed before the Board of Commissioners, praying that a public road be opened over the plaintiff's land so as to connect the site of said bridge with said public road, and that said petition is now pending before the board, and the board has in contemplation the construction of a public road leading to the proposed bridge.

That the proposed new bridge contracted for by the defendant board, is about one-half mile from the old bridge at Glenn's Mill.

That the said defendant Board of County Commissioners acted honestly and for what they conceived to be for the best interest of the people of Moore County."

Plaintiff requested the court to find certain other facts not necessary to be set out. His Honor upon the findings dissolved the restraining order, and refused to grant an injunction to the hearing. Thereupon the defendant demurred *ore tenus* and moved the court to dismiss the action because the complaint did not set forth facts sufficient to constitute a cause of action. Motion allowed and plaintiff appealed.

U. L. Spence and *Seawell & McIver* for the plaintiff.
W. J. Adams for the defendant.

CONNOR, J., after stating the facts: Two causes of action are set forth in the complaint, although not stated separately as directed by The Code. The plaintiff first relies upon the contract made with his ancestor, during the year 1882, by which he insists that the county of Moore is obligated to maintain and keep in repair the public bridge across Deep River, which was, pursuant to said contract, built by his father, who then owned the land upon which he erected a public mill. That performance of this contract may be specifically enforced by the writ of mandamus. This claim is entirely independent of the demand that the defendant be

enjoined from erecting a second bridge one-half mile below the present bridge. It is very doubtful whether the two causes of action, one to enforce a contractual right having no connection with his right, as a tax payer, in common with all other citizens of the county, and the other dependent entirely upon such relation to enforce the performance of a public duty, can be joined. As His Honor disposed of the cause upon a broader ground, we prefer not to pass upon this question of pleading. We do not think it competent for a Board of Commissioners to enter into a contract with a citizen, to perpetually maintain and keep in repair a public road or bridge, giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. The power vested in and duty imposed upon boards of commissioners to open and maintain roads and erect and keep in repair public bridges, is for the benefit of the public, and they have no power to exercise it for any other purpose, or to bind their successors in that respect. The Legislature, and the commissioners are but its agents, cannot do so. In *Bridge Co. v. Commissioners,* 81 N. C., 491, this court held that "the essential powers of government conferred for wise and useful purposes, should remain undiminished and unimpaired in the legislative body itself and pass in full force to its successors. When a contract undertakes to alienate any of these it is inoperative, and as no right vests, so no obligation is created under it." The exact question is settled by *Smith, C. J.,* citing with approval Greenleaf's Cruise, in which it is said: "It is therefore deemed not competent for a Legislature to covenant that it will not, under any circumstances, open another avenue to the public travel within certain limits, or a certain term of time, such being an alienation of sovereign powers and a violation of public duty." It does not very clearly appear that the contract made in 1882, by the commis-

sioners with plaintiff's ancestor, constituted a covenant running with the land or that it extended beyond his own life. In no point of view can the plaintiff maintain his first alleged cause of action. The bridge, considered either upon the averments of the complaint, or the findings of fact by His Honor, became, upon its completion, a part of the public highway, subject to the control of the commissioners, as all other bridges in the county. The fact that the commissioners paid only a part of the cost of its construction, did not change its character. *Stratford v. Greensboro,* 124 N. C., 131; *Trustees v. Realty Co.,* 134 N. C., 41.

For a second cause of action, plaintiff sues in his right as a tax payer to enforce the performance of a public duty. While the right to enforce by mandamus the discharge of a ministerial duty by a public officer is well settled and often exercised, it is equally well settled that when any discretion is vested in such officer in regard to the manner of performance, the courts will not order a mandamus. The duty to open and to discontinue highways and bridges, is vested in the commissioners of each county. Code, sec. 17, subsec. 15, chap. 50. The wilful failure to discharge this or any other public duty is a misdemeanor, and upon conviction, removal from office follows. Code, sec. 1090. A commissioner failing to discharge any duty imposed upon him by law, may also be sued for a penalty of $200. Code, sec. 711; *Turner v. McKee,* 137 N. C., 251. In *Brodnax v. Groom,* 64 N. C., 244, *Pearson, C. J.,* discussing the power of the court to regulate the manner in which county commissioners discharge the duty of building public bridges, says: "Who is to decide what are the necessary expenses of a county? The county commissioners, to whom are confided the trust of regulating all county matters. Repairing and building is a part of the necessary expenses of a county, as much as keeping the roads in order, or making new roads; so the case before us is within the power of the county commissioners. How can this court

undertake to control its exercise? Can we say, such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge it should be erected, as heretofore, upon posts, so as to be cheap, but warranted to last for some years, or that it is better policy to locate it a mile or so above, where the banks are good abutments, etc. * * * In short, this court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so," etc. To the same effect is *Buckman v. Coms.,* 89 N. C., 121; *Vaughn v. Coms.,* 117 N. C., 429; *Black v. Coms.,* 129 N. C., 121. The power of the court to direct a mandamus to a board of commissioners when discretion is vested in it, in respect to the manner of discharging a public duty, is fully discussed by *Mr. Justice Walker* in *Barnes v. Commissioners,* 135 N. C., 27. The authorities are carefully collected and the principles by which the action of the courts is controlled, clearly announced. In *State v. Town,* etc., 44 Minn., 549, the power of the courts to mandamus town commissioners to construct a public bridge was denied, the court saying: "It is unnecessary for us to consider under what circumstances, if at all, the courts will assume to control these officers in the exercise of the duties imposed upon them in respect to highways, and which, from their very nature, must be largely discretionary. It is certain that this should not be done unless the particular act, the performance of which is sought to be enforced, is so plainly and imperatively required, that a refusal or neglect to do it cannot be reasonably based upon grounds of discretion." The same conclusion was reached in *State v. County Court,* 33 W. Va., 589, in which it is said: "It may be that the county court has acted erroneously and even in disregard of the best interests of the people of the county, but having a discretionary power, it cannot, while legitimately exercising that power, however erroneously or contrary to the best interets of the county, be controlled by mandamus." In *State v.*

Coms., 119 Ind., 444, it is said: "It appears from the facts found, that the Board of Commissioners in the exercise of their discretion, refused to order the bridge repaired. The present is therefore not a case where the commissioners refused to act, but is one in which they did not act in a manner to suit the relators, who now ask the court to compel them to reverse their former action. This cannot be done by mandamus proceedings." Smith on Mun. Corp., section 1564; 19 A. & E. Enc. (2nd Ed.), 813. While we hold in accordance with the authorities cited in the light of the facts in this case, as developed either by the complaint or the facts found by the judge, that the plaintiff is not entitled to a mandamus commanding the commissioners to repair the bridge, we do not hold that in no case can such relief be granted. If the Legislature had directed a bridge to be built and maintained in proper condition for public travel as a part of a public highway, and provided the money or directed that a special tax be levied for that purpose, we would not hesitate to direct the writ to issue, commanding the board to discharge the imposed duty. The county, being an agency of the State, and the commissioners being, in respect to the opening and maintaining highways, State officers, may be compelled by mandamus to discharge such duty when no discretion is vested in them, as in *Tate v. Coms.*, 122 N. C., 812. In that case the General Assembly had by special act directed the commissioners of Haywood County to levy a special tax for the purpose of keeping in repair the public roads. The plaintiff applied to the court for a mandamus as in this appeal. The present *Chief Justice*, speaking of the status of counties, said: "They are subject to legislative authority which can direct them to do, as a duty, all such matters as they can empower them to do." Referring to *Brodnax v. Groom*, *supra*, he says: "It merely holds that as to those matters which the status has legally committed to the discretion of the county commissioners, the courts cannot interfere to re-

strain or supervise the exercise of that discretion. But this is no authority that the law making power cannot restrict the authority it confers upon the county commissioners by making the manner of working the roads mandatory in any county." *Jones v. Coms.*, 137 N. C., 579; *People v. Supervisors*, 142 N. Y., 271. In this case the power and duty of the commissioners being dependent upon the general law by which a discretion is vested in them, there is no power in the courts to interfere by mandamus. *Ewbank v. Turner*, 134 N. C., 85. The same reason and authorities bring us to the conclusion that His Honor properly denied the injunction restraining the defendant from proceeding to erect the bridge across the river as contracted for with the defendant Construction Company. It is true that the power to construct bridges is confined to public highways, and if it were made to appear that the defendant board was threatening to expend the public revenues to construct a bridge over a river at some point to which there was no approach or means of exit by the public, the courts would enjoin it as *ultra vires*. The power conferred by chapter 50 of The Code, to build and keep up bridges, refers exclusively to public bridges. This is manifest from the language of section 2034 of The Code. It is also true that His Honor finds that at this time there is no public highway leading to the point upon the banks of the river at which the proposed new bridge is to be built, but he also finds that the board has in contemplation the opening of a public road to such point, and that arrangements have been made for that purpose, that a petition has been filed and is now pending before said board for that purpose. The order in which the work is to be performed is within the sound discretion of the commissioners, and His Honor finds that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of the people of the county. This finding excludes any interference by the courts. It will be manifest, upon slight consider-

ation that an attempt on the part of the court to direct or control the exercise of such discretion, would lead to confusion and conflict highly injurious to the public welfare. We find no error in His Honor's judgment in that respect, nor do we find any error in the ruling rejecting the testimony proposed to be introduced by plaintiff. We notice that the summons is made returnable in term and not, as in cases where mandamus, for other than money demand, is prayed before the judge at chambers as provided by Code, section 623. This was doubtless because of the joinder of a prayer for injunctive relief. We are not quite sure that His Honor upon the hearing at Monroe, of the motion for writ of mandamus and injunction, should have dismissed the action. The cause should regularly have been docketed in Moore County at the time the summons was issued. It would have been more orderly for His Honor to have transmitted the orders made at Monroe to the clerk to be duly noted, and at the next term judgment dismissing the action, unless the complaint was by leave of court amended, be entered. *Ewbank v. Turner*, 134 N. C., 77.

We concur with His Honor that upon the allegations in the complaint the plaintiff was not upon either cause of action entitled to the relief demanded. There is

No Error.

IN RE SCARBOROUGH WILL.

(Filed October 31, 1905).

Wills—Production for Probate—Proceedings for Contempt —Power of Court—Practice.

1. Where the clerk of the court of G. county issued a notice to the respondent who had the will of the deceased in his possession to exhibit the same for probate, it was the duty of the respondent to obey the summons and he could have raised in his answer the question of whether the will should be probated in G. or L. county.

2. An order of the clerk the court of G. county which adjudged the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on appeal where it appears that the respondent cannot comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of the will and has refused to surrender it to the respondent.

3. Upon appeal from an order of the clerk adjudging the respondent in contempt, there was no error in the judge allowing additional affidavits to be filed on the hearing before him.

4. In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and cannot be passed upon.

This was a rule against B. F. Scarborough to appear and show cause why he should not be attached for contempt in not producing the will of Sam W. Scarborough for probate before the clerk of the Superior Court of Guilford County, heard by *Judge Geo. W. Ward,* by consent, at the August Term, 1905, of the Superior Court of GUILFORD County, on appeal from an order of said clerk adjudging the respondent in contempt. From the judgment discharging the respondent, the petitioners, A. E. and Clyde Scarborough, executors under said will, appealed.

In re SCARBOROUGH WILL.

Scales, Taylor & Scales for the petitioners.

John A. Barringer and *W. P. Bynum, Jr.*, for the respondent.

CLARK, C. J. S. W. Scarborough died 22 May, 1905, in Lenoir County. The clerk of the Superior Court of Guilford County, being of opinion that the deceased had his legal domicile in the county of Guilford at the time of his death, on 27 May, appointed collectors of his estate, and issued by virtue of section 2154 of The Code to the respondent in Lenoir County, who had the will of the deceased in his possession, notice to exhibit the same for probate in Guilford County. The notice was served on the respondent 29 May. Thereafter on the same day, the respondent consulted counsel in Kinston, Lenoir County, and the clerk of the Superior Court of said county, and under their advice delivered the will to the clerk of the Superior Court of Lenoir County, by whom, later, it was probated. The clerk of the Superior Court of Guilford County thereupon issued notice to the respondent to appear at his office in Greensboro, on 26 June, and show cause why he should not be attached for contempt. The respondent appeared and filed his answer setting forth the affidavit of counsel that he had advised the respondent that the will should be probated in Lenoir County, and the affidavit of the clerk of the Superior Court of Lenoir that on 25 May, he advised the respondent that the will should be probated in Lenoir; that on 29 May the respondent left the will in his office for probate, and that on 1 June the witnesses appeared, whereupon the said will was duly probated and recorded and is now on file in his office as part of the records thereof; that on 29 or 30 May the respondent came to his office and requested him to surrender said will that he might comply with the order of the clerk of Guilford Superior Court, but being of opinion that the will should be probated in Lenoir, he declined to surrender it to the respondent.

In the respondent's answer he avers that he was guided by the advice of counsel and of the clerk of Lenoir Superior Court; that he intended no contempt; that he is unable to produce the will because the clerk of Lenoir Superior Court refused to deliver the same to him; and he also filed many affidavits tending to show that the testator died domiciled in Lenoir County. Thereupon the clerk of the Superior Court of Guilford adjudged the respondent guilty of contempt and ordered that he be committed to jail, without bail, until such will was produced. Upon appeal the judgment was reversed, and the respondent was discharged.

When the notice from the clerk of Guilford Superior Court was served upon the respondent, it was his duty to obey the summons, and on appearing before the clerk of Guilford Superior Court he should have set up his evidence to show, if he could, that the will should be probated in Lenoir County, and if that were held against him he could have appealed to the judge, and thence to this court. Had the respondent been held for contempt and punished for such disobedience, the judgment would have been sustained if the disobedience was wilful and not an honest mistake, Code, section 648 (4), as the clerk seems to have adjudged, for he imposed no sentence for such contempt, but directed that the respondent be imprisoned unless he produced the will in fifteen days, and to remain imprisoned until he does.

As it sufficiently appears that the respondent cannot do this, that the clerk of Lenoir Superior Court has custody of the will (Code, section 2154), and has refused to surrender it to the respondent who applied for the same, that he might obey the process issued to him from Guilford, this amounts to an order of perpetual imprisonment, since it is out of the respondent's power to comply with the condition upon which he might be discharged. His Honor therefore properly discharged the respondent.

Nor was there error in the judge allowing additional affi-

davits to be filed on the hearing before him. *In re Deaton,* 105 N. C., 62, it is held that "on appeal from the Superior Court, the findings of fact by the judge are conclusive and this court can only review the law applicable to such state of facts, but upon appeal from a court below the Superior Court to that court, it is the duty of the Superior Court judge to review the facts as well as the law, and in his discretion he can hear additional testimony orally or by affidavits." This case has been cited and approved: *Finlayson v. Accident Co.,* 109 N. C., 199; *King v. Railroad,* 112 N. C., 321; *In re Gorham,* 129 N. C., 490; *Turner v. Machine Co.,* 133 N. C., 385.

The question whether the will should properly be probated in Guilford or Lenoir County is not presented and cannot be passed upon in this proceeding. Whether the clerk of Guilford was right or wrong in assuming jurisdiction, it was the duty of the respondent to obey the notice served upon him before he had delivered the will to the clerk of Lenoir, and he could have raised the issue in his answer to that summons. He should not have decided it himself. It is equally true that as the respondent has it not in his power now to produce the will, he cannot be imprisoned till he does, irrespective of the inquiry whether the will should be probated in Guilford or Lenoir.

No Error.

CUNNINGHAM v. RAILROAD.

(Filed October 31, 1905).

Issues—Insurance—Loan or Advancement—Subrogation—Real Party in Interest—Assignment of Cause of Action.

1. The refusal to submit issues tendered is no ground for exception, where the issues submitted fairly present to the jury the controverted questions of fact.

2. Where a cause of action is not against the defendant as a common carrier, but for that while the cotton was in a compress building belonging to J. awaiting compression and shipment, it was burned by the negligence of the defendant, a contract, between plaintiff and insurance brokers, to which the insurance companies were not parties, to make an advance "pending collection from the carrier or other bailee" has no application.

3. The receipt executed by the plaintiffs for "amount of 500 bales of cotton burnt at compress" and their letter acknowledging receipt of cheque "in settlement of our claim for total loss of 500 bales of cotton" and expressing their appreciation of the "promptitude with which the underwriters settled the claim," and their hope that the "underwriters will be recouped a substantial portion of their loss" negative any suggestion of a loan or advancement.

4. When the insurer against fire has paid the loss sustained, it is subrogated to the rights of the insured and can alone, under section 177 of The Code, as the real party in interest, maintain an action against the wrongdoer, and this right to be subrogated is independent of section 44, chapter 54, Laws 1899, and it is immaterial whether the insured makes an actual assignment or not.

5. If after knowledge of the payment of the loss by the insurer, the wrongdoer pays the damages sustained by the destruction of the property, such payment will not bar the action of the insurer to recover upon his subrogated right.

6. Where a cause of action is assignable, either at law or in equity, the assignee is the real party in interest and the equitable owner of any species of property or right of action must prosecute in his own name.

CUNNINGHAM *v.* RAILROAD.

ACTION by Danson Cunningham and others against the Seaboard Air Line Railway, heard by *Judge Walter H. Neal* and a jury, at the September Term, 1905, of the Superior Court of WAKE County.

This action was instituted by the plaintiffs, residents of Liverpool, England, for the recovery of the value of 500 bales of cotton alleged to have been burned by the negligence of the defendant. Two causes of action were set out in the complaint, but at the trial the plaintiffs withdrew all claim by reason of the first cause. The defendant denied that plaintiffs were the owners of the cotton or that the same was burned by its negligence. For a further defense the defendant alleged that the cotton was covered by insurance policies issued by The Standard Marine Insurance Company, Ltd., and The Thames and Mersey Marine Insurance Co., and that the insurance companies had paid to the plaintiffs, on account of said policies, the full value of the cotton. That, by reason of such payment, the companies were subrogated to any and all claim, right or demand which plaintiffs had against it by reason of the destruction of said cotton. That the insurance companies were the real parties in interest and were necessary parties to this action. Thereupon the insurance companies, by leave of the court, came in, made themselves parties plaintiff and filed their complaint, denying that they were subrogated to the rights of the plaintiffs, saying, however, that if the court should be of the contrary opinion, they adopted the complaint. Defendant duly answered the complaint of said insurance companies. At the conclusion of the evidence the insurance companies voluntarily took judgment of nonsuit. His Honor submitted to the jury the following issues: "1. Were the plaintiffs, Cunningham & Hinshaw, the owners of the cotton sued for at the time of the fire? Ans. Yes. 2. Was the cotton covered by policies of insurance, and has such insurance been paid? Ans. Yes. 3. Did such insurance inure to the benefit of the defendant,

and, if so, in what sum? Jury need not answer this issue. 4. Was said cotton burned by the negligence of the defendant, as alleged in the complaint? Ans. No. 5. What was the value of the cotton at the time and place of the fire." Judgment was entered upon the verdict, and plaintiffs appealed.

Armistead Jones & Son and *J. N. Holding* for the plaintiffs.

T. B. Womack and *Day & Bell* for the defendant.

CONNOR, J., after stating the case: The first issue having been found for the plaintiffs, we are brought to a consideration of the plaintiffs' exceptions to His Honor's rulings upon questions pertaining to the second issue. The plaintiffs tendered certain issues which His Honor declined to submit, and they excepted. We think that the issues submitted fairly presented to the jury the controverted questions of fact. Criticism is made of the form of the second issue, but as the jury were practically instructed how to answer it, the form becomes immaterial. The defendant took the depositions of certain persons, including one of the plaintiffs, in Liverpool. Many objections were made to the questions and answers contained in the depositions, the validity of which is dependent upon the conclusion to which we are brought in regard to the materiality of the testimony. The controversy was directed to the proposition, maintained by the defendant, that the cotton was insured and that the loss had been paid in full, before this action was commenced. That, by reason of such payment, the insurers became subrogated to the right of action, if any, which had accrued to the plaintiffs, and that under section 177 of The Code they were the real parties in interest and could alone maintain the action. The depositions tended to show that C. T. Bowring & Co., Ltd., of London, insurance brokers, took out for the plaintiffs policies

of insurance covering the cotton in controversy, in The Standard Marine and Thames Mersey Insurance Companies; that upon the destruction of the cotton the companies were duly notified of and adjusted the loss at the full value, plus ten per cent. for advance in price, as per terms of the policy. There is no serious controversy in respect to these facts. The plaintiffs denied that the loss had been paid, insisting that the amount received by them from the companies was an advance or loan to be repaid from the amount collected from the carrier. It appears that C. T. Bowring & Co., the brokers, gave to the plaintiffs a writing "on the inside but not attached to the policies," in the following words:

"SEASON OF 1902-1903.

C. T. BOWRING & CO., LTD., London.

SEPTEMBER 9, 1902.

Messrs Cunningham & Hinshaw:

In consideration of your acceptance of our policy containing the stipulation 'this policy does not cover any cotton in the custody or control of any land carrier or other bailee,' we agree that in event of loss on such cotton, we will advance to you our proportion of the amount of such loss, pending collection from the carrier, or other bailee, as a loan without interest, the repayment thereof to be conditional upon and only to the extent of the net amount recovered by you from the carrier, and we further agree that we will pay and assume all costs and expenses incurred by you in connection with such recovery."

On November 6, 1902, Bowring & Co. notified the insurance companies of the loss. On November 7, 1902, the company sent to Bowring & Co. the following:

"LIVERPOOL, 7 Nov., 1902.

Messrs. C. T. Bowring & Co., Ltd., London:

Cr. with The Standard Marine Insurance Co., Ltd.

By advance against 500 bales of cotton destroyed by fire at Hamlet, N. C., pending collection of loss from carrier, £2,357.10 cheque herewith."

On November 8, 1902, Bowring & Co. delivered to the Standard Fire Insurance Company the following receipt:

"LONDON, 8 Nov., 1902.

Received from the Standard Marine Insurance Company * * * the sum of two thousand, three hundred and fifty-seven pounds, thirteen shillings, and eight pence, being P. C. of mechanician 8 3-8 and claim account, fire at Hamlet, N. C., as per credit note No. 29216-29218, £2,357.10.8.

C. T. BOWRING & Co., Ltd."

The same transactions were had with The Thames Mersey Marine Insurance Co. The total amount of the loss, plus ten per cent. was £4,715. On November 11, 1902, the plaintiffs executed to Bowring & Co. the following receipt:

"LIVERPOOL, Nov. 11, 1902.

Received from Messrs. C. T. Bowring & Co. * * * the sum of four thousand, seven hundred and fifteen pounds, amount of claim five hundred bales cotton burnt at compress.

CUNNINGHAM & HINSHAW,
per Alfred Collins."

On the same day the plaintiffs sent Bowring & Co. the following letter:

"DEAR SIRS:—We are in receipt of your credit note and cheque in settlement of our claim for total loss of 500 bales of cotton burnt at Hamlet, N. C., and now enclose our receipt. We much appreciate the promptitude with which the underwriters have settled the claim. We sent the bill of lading by last Saturday's mail to our senior in New Orleans to assist in recovering from the carriers and we hope the underwriters will be recouped a substantial portion of their loss. Yours faithfully,

CUNNINGHAM & HINSHAW. * * *"

The only parol evidence bearing upon the construction of the writing was that of W. E. Hargraves, one of the members of the firm of Bowring & Co., who described the manner in which the policies were procured and the loss paid. W. A. Williams, who was underwriter to the Standard Fire Insurance Co., testified regarding the issuance of the policy, saying that the entire transaction was with Bowring & Co., and that the money was paid to them as an advance on the loss. S. T. Cross occupied the same relation to The Thames Mersey Company. Cunningham, one of the plaintiffs, testified that the plaintiffs were suing jointly with the insurance companies and were the real parties in interest. That they had a loan from the insurance companies. That he never saw the policies of insurance or the contract between the insurance companies and Bowring—only the policies between themselves and Bowring.

We have examined this testimony with care. His Honor instructed the jury that "Upon all of the evidence, if the jury shall find it to be true, the cotton was insured and the plaintiffs had been paid in full therefor and the jury will answer the second issue 'yes.'" To this instruction plaintiffs excepted. It will be observed that the plaintiffs' second cause of action, upon which they are demanding judgment, is not against the defendant as a common carrier, but for that

while the cotton was in a cotton compress building belonging to Chas. E. Johnson & Co., at Hamlet, awaiting compression and shipment, it was burned by the negligence of the defendant. Considered from this point of view the contract in regard to making an advance which seems to have been made by Bowring & Co., and to which the insurance companies are not parties, has no application. The agreement, contained in that writing is to make an advance "pending collection from the carrier or other bailee." Here there is no loss sustained while the property is in the possession of the carrier nor is the claim for any loss occurring from any default of the bailee, C. E. Johnson & Co., but against the defendant as an independent wrongdoer. The money could not well be said to have been paid pursuant to an agreement having no application to the manner of loss. We do not perceive any evidence of a loan by the insurance companies to the plaintiffs. Without discussing the construction of the several writings between Bowring & Co. and the insurance companies, it is sufficient to say that the receipt executed by the plaintiffs to Bowring & Co., on November 11, 1902, for four thousand seven hundred and fifteen pounds, "amount of claim of five hundred bales cotton burnt at compress," negatives any suggestion that Bowring & Co. were making a loan or advancement. This is further negatived by the terms of the letter of same date from plaintiffs to Bowring & Co., acknowledging receipt of cheque "in settlement of our claim for total loss of five hundred bales of cotton," etc. They also express their appreciation of the "promptitude with which the underwriters have settled the claim," and state that they have sent the bill of lading to their senior in New Orleans to assist in recovering from the carriers, expressing the hope that "the underwriters will be recouped a substantial portion of their loss." After a careful examination of the evidence, we concur with His Honor that the plaintiffs were paid in full by the insurers. There are authorities sustaining the claim of

the insured to recover of the carrier or wrongdoer for destruction of property when it is insured, the insurer having made a loan pending the litigation. We see no reason why this may not be done. The wrongdoer is primarily liable. In a case much like this, the court held that the transaction constituted a payment. *Lancaster Mills v. Merchant, etc.*, 14 S. W. 317 (Tenn)., in which a strong opinion is written by *Lurton, J.* The serious question in the appeal is thus presented: What were the rights of the insurers upon payment of the loss, and how is it to be worked out? This court, in *Insurance Company v. Railroad*, 132 N. C., 75, held that when the insurer had paid the loss, it was subrogated to the rights of the insured and could, under our Code, maintain the action against the wrongdoer. It is said, however, that this decision is based upon section 44, chapter 54, Laws 1899, by which the Standard Form of insurance policy is prescribed, and it is provided that the insurer shall, upon the payment of the loss, be subrogated, etc., and that the insured shall make an assignment to the company. That the statute writes into the policy this provision, and that these policies are not in the form prescribed and contain no such provision. We think that the right of the insurer to be subrogated to the rights of the insured, is independent of our statute. It has been recognized and enforced by many courts long before the passage of the statute, which was merely declaratory of the law. Mr. Sheldon, in his work on Subrogation, section 230, says: "The insurers against fire, of property which has been destroyed by fire, communicated from a locomotive engine, will, upon payment of the loss, be subrogated to the extent of their payments to the remedies of the insured, or the owners of the property insured and destroyed, against the railroad company for the loss." *Chief Justice Shaw*, in *Hall v. Railroad*, 13 Metc. (54 Mass.), 99, with his usual force and clearness, says: "Now, when the owner, who *prima facie* stands to the whole risk, and suffers the whole loss, has engaged another person

to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership, and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he had a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto,* by a deduction from and growing out of a legal provision attached to, and intrinsic in the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the railroad company who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to-wit: the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected."

To the same effect is *Monmouth Ins. Co. v. Hautch, etc.,* 21 N. J. Eq., 107. "The payment of a total loss by the in-

surer works an equitable assignment to him of the property and all the remedies which the assured had against the carrier for the recovery of its value." *Mobile & Mont. Railroad v. Jurry,* 111 U. S., 584. This right is not dependent upon, nor does it grow out of any privity of contract. It is a doctrine of equity by which one, who is secondarily liable upon a contract, pays the debt, or discharges the obligation, is substituted to all of the rights of the creditor or person holding the claim against the party primarily liable. It is based upon equitable conceptions of natural justice. It is not dependent upon an actual assignment of the debt or obligation. "The rights acquired by subrogation do not depend upon a written assignment of the claim. Upon payment of the insurer, the insurance company is regarded as an assignee in equity." Clement on Fire Insurance, 368, citing *Ins. Co. v. Railroad, supra,* and many other cases.

Prior to the adoption of our Code of Procedure, the action to enforce the claim of the insured could be prosecuted in a court of law, only in the name of the insured, to the use or for the benefit of the insurer. The insurer has the same right or cause of action which the insured had, and his recovery is limited to the rights of the insured. He could not prosecute an independent cause of action for the wrong done, but only that which accrued to the insured. This right is not based upon any supposed consent of the insured to permit him to sue in his name, it is an absolute right created and conferred upon the payment of the loss. It is held, that if, after knowledge of the payment of the loss by the insurer, the wrongdoer pay the damages sustained by the destruction of the property, such payment will not bar the action of the insurer to recover upon his subrogated right. *Fire Ins. Co. v. Hautch, etc., R. Co., supra,* the Chancellor saying: "If the railroad company had not paid H. his damages, or had paid them to him knowing that he had received the amount insured from the complainants, they are liable to the complainants in a suit at law,

which they have the right to bring in the name of H. without his consent, to repay them the damage to the amount of the sum paid by them, and that release by H. would be no defense to such suit." It will be observed that in many of the cases cited, the suits are brought in the name of the insured, but it will be noted that they are to the use or for the benefit of the insurer. In *Hart v. Railroad, supra,* "the insurance company sues in the name of the plaintiff," etc., in *U. S. v. Tobacco Co.,* 106 U. S., 403, suit was brought to the use of the insured. We think the authorities abundantly sustain the proposition that the right of the insurer upon payment of the loss is perfect and absolute, and that he is the real party in interest. It would seem to follow that under section 177 of our Code, the insurer must bring the action. While it is true that section 177 does not authorize the assignment of a thing in action not arising out of contract, it has been held that where a cause of action is assignable, either at law or in equity, the assignee is the real party in interest, and that the equitable owner of any species of property, or right of action must prosecute in his own name. In *Hart v. Railroad, supra,* it is said that the right to sue is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit, except under the reformed Codes of Procedure, which permit any action to be brought in the name of the real party in interest. Sheldon on Subrogation, sec. 230; Clement on Fire Insurance, 369. "The right of the insurance company is derived from the insured alone, and can be enforced in his right only. At common law it must be asserted in the name of the insured, or, under the modern Codes of Practice, it may be asserted by the insurance company in its own name, when it has paid the full value of the property insured." *Ibid.* We do not think that the right to sue in its own name, as sustained by this court in *Insurance Co. v. Railroad, supra,* is dependent upon the Act of 1899, nor do we think the language of the Chief Justice

open to that construction. For some, we presume, good reason, the insurance companies voluntarily retired from this litigation, thereby expressly repudiating the suggestion that it was being prosecuted for their benefit. So far as this record shows, this action is prosecuted by the plaintiffs, for the purpose of recovering the value of the cotton burned for their own benefit. It may be that if they were permitted to recover, the insurers would be entitled to sue them for the amount. However this may be, it is clear that the insurers may also, and, notwithstanding the result of this action, sue the defendant upon their subrogated right. It is an elementary truth that a defendant should not be subjected to two actions by different parties for the same wrong. The case of *Hammond v. Schiff*, 100 N. C., 161, does not present the question decided in this case, nor is that decision in conflict with what is here decided. The wrongdoer being primarily liable, cannot reduce the amount of the plaintiff's recovery by showing that he is insured, nor can the insurance company in an action upon the policy, reduce the recovery by showing that the plaintiff has a cause of action against the wrongdoer. In the last case, the insurer must, in discharge of his contract, pay the loss and obtain indemnity by suing, formerly in the name of the insured, now under our Code, in his own name, the wrongdoer. As said by *Shaw, C. J.*, if the insured has sued the wrongdoer and recovered the whole or a portion of the loss, such recovery will enure to the benefit of the insurer, who, as between the wrongdoer and himself, is primarily liable. In neither case and by no method of procedure, will the injured party be allowed to recover double satisfaction. His right as against either is to be compensated for his loss; to one, he looks by way of damages for the tort; to the other, by way of indemnity upon his contract. To the suggestion that if the plaintiffs are not permitted to recover, the wrongdoer is not required to pay damage sustained by his wrongful act, it is sufficient to say that he is liable to only one party,

primarily to the injured party, by substitution to the party who has indemnified the injured party. If the insurance companies do not choose to prosecute their right, that is no reason why the plaintiffs shall be permitted to recover double satisfaction, or to maintain a cause of action which, by receipt of the money from the insurance company, passed out of them into the company. For reasons based upon the distribution of remedial powers between two jurisdictions, the cause of action which vested in the insurer, was formerly prosecuted in the name of the insured; now, when all such distinctions are abolished, and all rights are enforced, and wrongs redressed in one form of action, by the real party in interest, the insurer may sue, or, to cite the language of the *Chief Justice* in *Insurance Co. v. Railroad, supra,* "whether the insured made an actual assignment or not is immaterial, as the subrogation was complete upon the payment, and the sole right of recovery passed to the company." As showing the opinion prevailing in the profession, we note that other suits based upon payment of loss by an insurance company for property burned, are brought in the name of the company. *Ins. Co. v. Railroad,* 138 N. C., 42.

Being of the opinion that the plaintiffs, not being the real parties in interest, cannot maintain the action, we do not deem it necessary to discuss the exceptions to His Honor's rulings pertaining to the fourth issue. The judgment must be

Affirmed.

DAVIS v. EVANS.

(Filed October 31, 1905).

Evidence — Transaction with Deceased — Argument of Counsel.

1. In an action on a note given by defendant's intestate, if the plaintiff had undertaken to testify in his own behalf that he had or had not made a demand for payment of the note of the intestate such evidence should on objection have been excluded as incompetent under section 590, and it was not proper for defendant's counsel to comment on the failure of the plaintiff to testify on this question of demand.

2. Where counsel for the defendant, in his closing speech to the jury, commented on a fact not relevant to the issue and argued an erroneous proposition of law and this was immediately brought to the attention of the court, both by objection and by a prayer for instruction presented at the time, the failure of the court to advert to the matter either at the time or in the charge was error, which entitles the plaintiff to a new trial.

ACTION by S. E. Davis against M. E. Evans, Administratrix of A. M. Evans, deceased, on appeal from a justice of the peace before *Judge H. R. Bryan* and a jury, at the November Term, 1904, of the Superior Court of GRANVILLE County. The plaintiff declared on a note given to him by the defendant's intestate, and the defendant having pleaded payment, the question was held on that issue. Verdict and judgment for the defendant, and the plaintiff excepted and appealed.

Graham & Devin for the plaintiff.
No counsel for the defendant.

HOKE, J. The question presented for consideration is stated in the case on appeal as follows:

"When counsel for defendant in his closing speech to the jury contended that plaintiff had failed to testify that he had

ever demanded payment of the note from Mark Evans, in his life time, and proceeded to argue that that was some evidence that the note was not due, the counsel for plaintiff arose and called attention to the fact that under section 590 of The Code, the plaintiff was not competent to testify as to any transaction or conversation with the deceased, and at once requested the court in writing, to charge the jury as follows: 'That Mark Evans being dead, the plaintiff could not testify as to any transaction or conversation with him, except some conversation about which the administratrix had testified, and therefore could not have testified that he demanded payment of the note of Mark Evans, in his life time.' "

The court charged the jury as follows: "Defendant having admitted the execution of the note, the burden of proof as to its payment is upon her and she must show payment by the preponderance of the evidence. She contends the note has been paid, and the plaintiff contends it has not been paid. It is a mere question of fact. Counsel for defendant was right in stating that there is no law in it. If you find for defendant you will answer the issue 'yes;' if you find for plaintiff you will answer the issue 'no,' " and made no other response to plaintiff's prayer for instruction, nor other reference to the argument of defendant's counsel, objected to by plaintiff, either in the charge or at the time the same was made.

If the plaintiff had undertaken to testify in his own behalf that he had or had not made a demand for payment of the note of the defendant's intestate, such evidence should on objection have been excluded by the court. It clearly involved a transaction with the deceased, and was incompetent under section 590. *Armfield v. Colvert,* 103 N. C., 147; *Hopkins v. Bowers,* 108 N. C., 298; *Davidson v. Barden,* and *Stocks v. Cannon,* at this term.

When the counsel for defendant proceeded to comment on the failure of the plaintiff to testify on this question of demand, he was commenting on a fact not relevant to the issue,

and when he further argued to the jury that such testimony would not have been as to a transaction or conversation with the deceased, he was urging an erroneous proposition of law. This was immediately brought to the attention of the court, both by objection and by the prayer for instruction presented at the time. The argument was continued with the apparent sanction of the court, and was well calculated to make a wrong impression on the jury, to the plaintiff's prejudice. In failing to advert to the matter, either at the time or in the charge, there was error which entitles the plaintiff to a new trial.

Furthermore, the statement in the charge, "that the case presented only a question of fact; that the counsel for the defendant was right, there was no law in it," tended to confirm the impression the jury had no doubt already conceived, that the court approved, as sound, the legal proposition maintained by counsel. There is error. 2 Eng. Pl. & Pr., 710; Thompson on Trials, sec. 950; *People v. O'Brien*, 68 Mich., 467; *State v. Erle*, 9 Mo. App., 589; *State v. Ussery*, 118 N. C., 1177.

New Trial.

LANE v. COMMISSIONERS.

(Filed November 7, 1905).

Taxation—Emigrant Agents—Officer of Foreign Corporation.

An officer of a foreign corporation coming into this State and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business of hiring hands," etc., and is not liable for the tax on emigrant agents, under Revenue Act of 1905.

ACTION by C. W. Lane against Board of Commissioners of Rowan County, heard by *Judge R. B. Peebles,* upon an agreed statement of facts, at the August Term, 1905, of the Superior Court of ROWAN County.

Civil action begun in justice's court and, upon appeal, heard in the Superior Court on an agreed statement of facts: The plaintiff is and was at the times hereinafter mentioned, a resident of the State of Virginia. He is and was at said times one of the four stockholders, and a director and the secretary of Lane Bros. Co., a corporation doing railroad construction work in the States of Virginia and West Virginia. The work of the company at * * * West Virginia, is and was at said times, under the immediate control and management of the plaintiff. He alone hired employees to labor for the company at * * * West Virginia, and he alone had authority to discharge them. The three other members of the company severally had entire charge of the construction work in three different places in said States.

On July 18, 1905, the plaintiff was in Rowan County, North Carolina, and then and there procured laborers for employment for Lane Bros. Co., to work under himself at * * West Virginia, on certain railroad construction, which he superintended and managed for the company. None of the laborers were used or employed in any other business, or

under the management of any person other than the plaintiff. The plaintiff came to Rowan County for this purpose. They were not carried to West Virginia for any other purpose. The plaintiff received no consideration or compensation for carrying the laborers out of the State, from any person or corporation. He received as such manager and secretary, a regular salary from Lane Bros. Co., and the company paid the transportation of the laborers to West Virginia. He has not solicited laborers to leave this State to be employed in any business, and under no management except as above.

At the time he paid the emigration license tax, as hereinafter set forth, it was not his purpose to carry laborers from North Carolina, except to be used as above, and under his personal direction. The plaintiff is not an emigrant agent unless the above facts constitute him such. Before taking the laborers away, the sheriff of Rowan County required him to pay an emigration license tax of $200. (Sec. 74, chap. 588, Acts 1905). The tax was paid under written protest, and to avoid being detained and interrupted in his business, the plaintiff contending that the collection thereof was illegal, invalid and unauthorized, and that the tax impairs the privileges and immunities of the citizens of one State in another State. Within thirty days after paying the $200 license tax, he demanded in writing of the proper State and county officers, that the amount be refunded to him in accordance with sec. 30, chap. 558, Public Acts 1901, and the officers refused to refund it or any part thereof. From a judgment for the plaintiff, the defendant appealed.

Overman & Gregory for the plaintiff.
T. C. Linn for the defendant.

CONNOR, J., after stating the case: The defendants contend that the facts set forth brings the case within the decision in *State v. Roberson*, 136 N. C., 587. It will be noted

that the jury in that case found by a special verdict that the defendant "did engage in the business of procuring laborers for employment out of the State, to-wit: for one R. H. Jones, in the State of Georgia, without having paid," etc. This finding brought the defendant clearly within the language and spirit of the statute.

This case, in our opinion, comes within the principle of *Carr v. Commissioners,* 136 N. C., 125—the only difference between the two cases being that in one the plaintiff hired hands for himself, while in the other he hired for a corporation of which he was director and manager, in respect to the work for which the hands were employed. In neither case can it be said the plaintiff was "engaged in the business of hiring hands," etc. We cannot perceive any distinction between the cases because of this difference. As we said in both cases (following *Moore's case,* 113 N. C., 697; 22 L. R. A., 472; and *Hunt's case,* 129 N. C., 686; 85 Am. St. Rep. 758), the statute is a revenue measure imposing a tax upon the business of hiring hands, etc. Its validity can be sustained only upon this view. We do not intend to hold that a corporation, engaged in business in another State, may employ an agent to come into this State and "engage in the business" of hiring hands without being amenable to the tax. We simply hold that an officer of a foreign corporation, coming here under the circumstances set forth in this record, and hiring hands for employment by himself, as the officer of the corporation, is not "engaged in the business," etc. It may be difficult to draw the line in advance, so as to make the demarkation clear. We can only decide each case as it comes to us, keeping in view the general principle announced in *Moore's case,* and in *Hunt's case, supra.*

We concur with His Honor. The judgment must be

Affirmed.

BERNARD v. SHEMWELL.

(Filed November 7, 1905).

Pleadings—Demurrer—Parties—Premature Appeal—Mortgagor and Mortgagee—Foreclosure.

1. Where a demurrer, in a proceeding for foreclosure upon the ground that the mortgagor, who had assigned his equity of redemption, was not made a party, was sustained, but no order was made directing him to be made a party, or dismissing the action for failure to do so, no appeal lies at this stage, even if such order is prejudicial.

2. A mortgagor who, since the execution of the mortgage, has parted with his interest in the premises by an absolute conveyance, retaining no longer the equity of redemption, is not a necessary defendant in foreclosing the mortgage.

ACTION by George Bernard against Baxter Shemwell and others, heard upon demurrer, by *Judge Henry R. Bryan*, at the April Term, 1905, of the Superior Court of DAVIDSON County. From a judgment sustaining the demurrer, the plaintiff appealed.

Walser & Walser for the plaintiff.
McCrary & Ruark and *E. E. Raper* for the defendant.

Per Curiam: This was a demurrer in a proceeding for foreclosure upon the ground that the mortgagor, who had assigned his equity of redemption, was not made a party. The judge sustained the demurrer, but did not make any order directing him to be made a party, or dismissing the action for failure to do so. Had the plaintiff declined to make the additional party and the action had then been dismissed, an appeal would lay. But the plaintiff should either have taken that course, or have had his exception noted, and making the additional party, should have brought the interlocutory order

up for review, if it proved prejudicial and the final judgment were against him. If the final judgment should be in his favor, or the interlocutory order should not prove injurious, a review thereof would not be desired. The court does not entertain fragmentary appeals. It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary, and not reviewable. Code, section 273; *Tillery v. Candler,* 118 N. C., 889, and cases cited.

But should it be contended that such order is prejudicial, no appeal lies at this stage. *Lane v. Richardson,* 101 N. C., 181; *Emry v. Parker,* 111 N. C., 261; *Bennett v. Shelton,* 117 N. C., 103; *Gammon v. Johnson,* 126 N. C., 67. The appellant should have noted his exception and have presented it for review upon appeal from the final judgment, should it be adverse to him.

Even if the mortgagor had been made a party, no probable injury to the plaintiff thereby is shown. The appeal must be dismissed because premature, but it is not amiss to say that the mortgagor could have no possible interest in this action, since he had conveyed his equity of redemption. "It is well settled that a mortgagor who, since the execution of the mortgage, has parted with his interest in the premises by an absolute conveyance, retaining no longer the equity of redemption, is not a necessary defendant in foreclosing the mortgage. Neither are the heirs of such person necessary parties, nor are his personal representatives or his wife." 9 Enc. Pl. & Pr., 332, and numerous cases there cited; Jones on Mortgages (3rd Ed.), sec. 1402.

The court having sustained the demurrer, the plaintiff should be allowed to make the mortgagor a party, or if (as suggested) this is impossible, the judge may allow the complaint to be amended so as to set up that allegation.

Appeal Dismissed.

WALKER v. MILLER,

(Filed November 7, 1905).

Partnership—Death of Partner—Deed—Partnership Name—Latent Ambiguity—Powers of Court—New Parties—Equitable Title—Jurisdiction of Justice of Peace.

1. The death of a partner, in the absence of any stipulation in the articles of co-partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner.

2. An arrangement between distributees and legatees to permit their property with the consent and co-operation of the personal representatives of deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership.

3. A deed made to "Jas. Webb, Jr., & Bro.," a partnership name and style adopted by the distributees and legatees of the deceased partners, is valid, though the partners are not named in the deed, it being a latent ambiguity which may be explained by parol.

4. The court may at any time before or after judgment direct other persons to be made parties to the end that substantial justice be done.

5. The owner of an equitable title may sue in a justice's court for the recovery of crops.

ACTION by C. Y. Walker and others against W. J. Miller, heard by *Judge R. B. Peebles*, at the March Term, 1905, of the Superior Court of ORANGE County.

This is an action for the recovery of crops, instituted in justice's court, brought by appeal to the Superior Court, and heard by His Honor, *Judge Peebles*, who by consent, found the facts respecting the title to the land upon which the crops

were grown. For some time prior to 1893, Jas. Webb, Jr., and Jos. C. Webb, were engaged in mercantile business, as co-partners, under the firm name and style of Jas. Webb, Jr., & Bro. Jos. C. Webb died in the year 1893, leaving a last will and testament, properly executed and proven to pass real and personal estate, naming Jas. Webb, Jr., executor, who duly qualified. He bequeathed and devised his entire estate to his widow, Alice Webb.

With the full knowledge and consent of said Alice Webb, the surviving partner and executor continued to conduct the said mercantile business under the same name and style. Mrs. Webb did not become a member of the firm, but permitted and consented that the executor should use her husband's estate to carry on the business as it was done prior to his death.

James Webb, Jr., died in February, 1904, intestate, leaving as his heirs at law and distributees, Mary Webb, his widow, and Brown R. Webb, and J. C. Webb, his sons. The estate of Jos. C. Webb was not settled at the time of the death of said Jas. Webb, Jr.

A. J. Ruffin and H. W. Webb were appointed and duly qualified as administrators of Jas. Webb, Jr., deceased. T. N. Webb and J. Cheshire Webb were appointed administrators, with the will annexed, of Jos. C. Webb, deceased. On the 15th day of February, 1904, the said administrators joined in the publication of a notice to debtors of the firm of Jas. Webb, Jr., & Bro., to make prompt payment, concluding: "We take great pleasure in assuring the old friends and patrons of this firm that the business is to be continued indefinitely under the same style and management, and we earnestly solicit the continuance of your valued patronage, promising to give you, at all times, the best possible values, together with the most courteous treatment." Neither of the administrators put any money into the business, nor did they intend to form a new firm, but did intend to give notice that

the business would be continued under the firm name and style of Jas. Webb, Jr., & Bro., with the funds belonging to the estates of the deceased partners, which had been invested in said business. This action was taken with the full knowledge and consent of the heirs, distributees, devisees and legatees, of both of said deceased partners. On July 18, 1904, the property and assets of the firm of Jas. Webb, Jr., & Bro. were sold to H. W. and J. C. Webb. The old firm was continued for the sole purpose of collecting the debts and settling the business. J. Cox Webb was appointed agent to collect the debts due the firm.

Jas. Webb, Jr., & Bro. held a judgment against defendant Miller, duly docketed in Orange County. D. S. Miller held a mortgage on the lands of defendant Miller, which he duly foreclosed under power of sale therein. The crops in controversy were growing on the lands at the time of the sale. J. Cox Webb became the purchaser at the sale, paying the purchase price from money collected by him on account of the debts due Jas. Webb, Jr., & Bro., and took deed therefor to Jas. Webb, Jr., & Bro. Soon thereafter, Alice H. Webb, widow of Jos. C. Webb, and B. R. Webb, J. Cox Webb, children, and Mary B. Webb, widow of Jas. Webb, Jr., executed a deed for said land to plaintiffs. The land brought at said sale an amount in excess of the mortgage debt. In an action brought by defendant Miller, the administrators of Jas. Webb, Jr., and Jos. C. Webb intervened; the said Miller claimed and recovered on account of his homestead interest in said land, $112.75, the balance, $55, being applied to the judgment held by said administrators. His Honor was of the opinion, upon the foregoing facts, that as the title to the land did not pass by the deed from D. S. Miller to Jas. Webb, Jr., & Bro., the plaintiffs acquired none by the deed of Mrs. Alice Webb and others. He rendered judgment dismissing the action. The plaintffs excepted and appealed.

Jno. W. Graham for the plaintiffs.
No counsel for the defendant.

CONNOR, J., after stating the case: His Honor was of the opinion that there was no such person or partnership in existence as Jas. Webb, Jr., & Bro. at the time of the sale of the land, and upon the elementary proposition that, to constitute a valid deed of conveyance, there must be a grantor, grantee and thing granted, the deed or paper writing having the form of a deed was inoperative. It is of course common learning that the death of a partner, in the absence of any stipulation in the articles of co-partnership to the contrary, works an immediate dissolution; that the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. We speak only of the personalty in this connection. The facts found by His Honor show that upon the death of Jos. C. Webb, his widow, sole legatee, permitted the surviving partner, who was also executor of her husband, to continue the business under the name of the old or original firm. This condition, with her consent, continued for nine years. The only persons interested in the assets, other than creditors, were Jas. Webb, Jr., and Mrs. Alice Webb. His Honor finds that Mrs. Alice Webb did not become a member of said firm so as to be personally responsible for debts incurred after her husband's death. We do not see how this is material to the questions presented upon this appeal, and we do not express any opinion regarding her liability to creditors, notwithstanding her purpose or intention. Certainly she and the executor were the real, beneficial and only owners of the property and the profits accruing from the business. Upon the death of Jas. Webb, Jr., the same arrangement was made and continued by all of the parties in interest. They were all *sui juris,* and we can see no reason why *inter sese* it was

not competent for them to permit their property, with the consent and co-operation of the administrators, to remain in common and be used for their joint benefit, adopting any name or style agreeable to them for more easily and conveniently carrying out their purpose. The fact that they chose to carry on the business under the name of the old firm, does not change their rights. They could, if they had so preferred, selected any other name. Of course, the old firm, as originally constituted, was dissolved by death of the partners. Whether the parties so intended or not, the legal effect of what they did was to create a new and original arrangement for carrying on business, the capital of which was contributed by the beneficial owners of the property. The fact that they selected the administrators of the deceased partners to manage the business so far as the questions presented upon this record, is immaterial. It may be that if debts were contracted, liabilities not contemplated would have attached. For the purpose of this appeal, the transaction consisted of an arrangement between the distributees and legatees with the approval of the administrators to use the property for a joint and common benefit. The widows and children of the deceased partners were the owners and the administrators were their agents. Viewed from this standpoint, we have parties conducting business in a manner which in a limited, if not absolute sense, constituted a partnership adopting a name, which, by reason of being well-known and enjoying the confidence of its customers, was valuable to them. It was entirely proper, and not unusual, that they should do so—there was no concealment of the personal status of the parties. They gave notice of the death of the original partners. It is not uncommon for a business which, by reason of the credit and reputation for integrity of the founders, possesses value to be conducted, after their death, under its original name. In such cases it is the business of the living owners, and contracts made by or with them, under

the name adopted, have all the force and effect as if made in the names of the individuals to whom it belongs. A man, if he chooses, may carry on business in a name other than his own, or is said by *Erle, C. J.,* in *Maughan v. Sharpe,* 112 E. C. L., 443: "It is clear that individuals may carry on business under any name and style which they may choose to adopt." That a deed to a partnership, in which the partners are not named, is valid, is abundantly established by this, and many other, courts. In *Murray v. Blackledge,* 71 N. C., 492, the deed was made to Murray, Ferris & Co.;" to the objection that the deed was inoperative because there was no grantee, *Rodman, J.,* said: "But a deed for land is not for that reason void, any more than a bond for the payment of money is. It is a latent ambiguity which may be explained by parol." *Institute v. Norwood,* 45 N. C., 65. In *Morse v. Carpenter,* 19 Vermont, 614, the mortgage was made to "Morse & Houghton, of Bakersfield." Parol evidence was received to show that two persons were doing business in Bakersfield under that firm name. *Royce, C. J.,* referring to descriptions *ambiguitas patens,* said: "There is, however, an important difference between a description which is inherently uncertain and indeterminate, and one which is merely imperfect, and capable on that account of different applications. To correct the one is, in effect, to add new terms to the instrument; while to complete the other is only to ascertain and fix the application of terms already contained in it." The distinction between a patent and a latent ambiguity is pointed out with his usual clearness by *Pearson, C. J.,* in *Institute v. Norwood, supra.* In *Wakefield v. Brown,* 38 Minn., 361, it is said: "If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies

terms already contained in it." The same principle controls when the uncertainty or ambiguity is regarding the grantee. The same is held in *Blanchard v. Floyd,* 93 Ala., 53, *Coleman, J.,* saying: "If the proof shows that Blanchard & Burrus, a partnership, were the purchasers of the land they owned as tenants in common an equitable interest in the land." In *Mewage v. Burke,* 43 Minn., 211 (45 N. W. R., 155), a mortgage to "Farnham & Lovejoy" was held valid, *Dickinson, J.,* saying: "While it is necessary to the legal validity of such instruments that there be a grantee having a legal existence, capable of taking, and certainly designated, or so designated that his identity can be certainly ascertained, these conditions are complied with in this case; resort being had, as may be done, to facts beyond the instrument for the purpose of applying the description or designation of the persons named to the persons so described." 1 Jones on Conveyances, 244. In *Maughan v. Sharpe, supra,* the deed was executed to "The City Investment and Advance Co." It was objected that as there was no such corporation, the deed was void. *Erle, C. J.,* said: "The bill of sale under which the defendants claim purports to convey the property to The City Investment and Advance Co., and not to the defendants by name; and it was contended for the plaintiffs that the goods could not pass to Sharpe and Baker * * * It is clear that individuals may carry on business under any name and style which they may adopt, and I see no reason why the defendants may not do so under the name of The City Investment and Advance Co. * * * As between these parties the company are Sharpe and Baker, and the conveyance in question is a conveyance to those individuals, I cannot therefore say that the deed was inoperative on this ground."

Williams, J., said: "In this case, I apprehend the meaning of the grant is plain; the deed purports and intends to convey the goods to those persons who use the style and firm of The City Investment and Advance Co. They may or may

not be a corporation, but, where it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them." Sheppard's Touchstone, 236. His Honor, in his judgment, cites the case of *Neal v. Nelson*, 117 N. C., 393, in which it is held that a deed to "A and his heirs," A being dead, is void. This decision is put upon the ground that "heirs" is a word of limitation and not of purchase. It is said that a deed to "A or his heirs" would be good, A being dead, if his heirs could be ascertained. It is well settled that a deed to "A and his children" is valid to vest the title in them as tenants in common. His Honor was of the opinion that "After July 18, 1904, when the goods and store were sold to H. W. Webb and J. C. Webb, no one constituted the old firm of Jas. Webb, Jr., & Co. It then ceased to exist." He therefore concluded that the deed from D. S. Miller conveyed nothing, leaving the legal title in Miller in trust for the administrators. If it be conceded, as His Honor concluded, that the old firm ceased to exist, certainly the assets belonged to some one. Jos. C. Webb was appointed agent to collect them. There were no debts to pay, the assets then belonged to the legatees and the distributees of the deceased partners. When J. Cox Webb, in executing the trust reposed in him to collect the assets, purchased the land with the money of his principals and directed title to be made in the name of the old firm, it is manifest that it was his purpose to put the title in the persons who paid the purchase money. They ratified his act, treating the land as theirs by selling to the plaintiffs. The defendant, W. J. Miller, recognized the status of the title by suing for and receiving from the purchase money his homestead interest. We can perceive no reason why, both upon reason and authority, in the light of the fact found by His Honor, the latent ambiguity in the description of the parties in the deed is not removed, and the true owners ascertained to be the grantors of the plaintiffs. *Lowe v. Carter*, 55 N. C., 383; *Ryan v.*

Martin, 91 N. C., 464; *Simmons v. Allison*, 118 N. C., 776. It is sometimes said that only an equitable title is conveyed in such cases. The better view, we think, is that which we find sustained by the authorities cited, that the ambiguity is latent and open to explanation by which the real party is disclosed and the deed treated as if the name were inserted. If, however, the other view be adopted, the same result would follow in this case. It is well settled, under our judicial system, that a party may recover in ejectment upon an equitable title. Clark's Code, section 177, and cases cited (p. 102). The mortgagee, D. S. Miller, has sold under the power and received the purchase money more than sufficient to pay the mortgage debt. The mortgagor, W. J. Miller, has received his interest in the surplus—the administrators turned over the assets of the late firm of Jas. Webb, Jr., & Bro. to J. C. Webb to collect for the benefit of the owners—he has in the discharge of his agency applied their money to the purchase of the land and procured a deed to be made, as he understood and intended, to them—they acting upon the belief that the land was theirs, have sold for a valuable consideration to the plaintiffs. We cannot see how a more perfect equitable title could vest in the plaintiffs. If, as the learned judge thought, the naked legal title still remained in D. S. Miller, certainly no one save the plaintiff can call for it. There are no unadjusted questions between the administrators and the grantors of the plaintiffs, or between W. J. Miller and either of the parties to the transactions—he does not suggest any reason why the plaintiff should not recover save that they are not the real parties in interest. We think that they are the real and only parties in interest, and are entitled to recover the crops. If, however, D. S. Miller was a necessary party, we can see no reason why he should not be brought in now to perfect the record. The action should not have been dismissed. The court may at any time before or after judgment direct other persons to be made parties to the end that substantial

justice be done. While it is true that a justice has no power to administer an equity—the owner of an equitable title may sue in the justice's court. *Lutz v. Thompson,* 87 N. C., 334. Many of the difficulties which obstructed the courts in the administration of justice and necessitated the dismissal of suits because of a divided jurisdiction between courts of law and courts of equity—or the failure to sue out the writ applicable to the right to be enforced—are avoided by the reformed codes of procedure. Courts now seek to ascertain the facts and administer the right to the real party in interest. Amendments are liberally made to enable the court to so mould the judgment that substantial justice is administered. Upon the facts found by His Honor judgment should have been entered that the plaintiffs are the owners of the crops in controversy. Judgment will be entered accordingly in the Superior Court of Orange.

Error.

TUSSEY v. OWEN.

(Filed November 7, 1905).

Contracts—Performance by Plaintiff—Pleadings—Issues—Burden of Proof—Evidence—Recovery on Specific Contract—Quantum Meruit.

1. In an action to recover on a specific contract for services rendered to the testator, where the complaint failed to allege in specific terms that the plaintiff fully performed the contract on her part, or that she was prevented from performing it by the testator, or by those authorized to act for him, it should be redrafted as to those particulars or properly amended.

2. In an action to recover on a specific contract for services rendered by plaintiff to her father, the proper issue as to amount of recovery is "what sum, if any, is plaintiff entitled to recover."

3. Although the breach of a specific contract for services rendered to the testator is admitted by the answer, the burden is still on the plaintiff to establish the performance of it on her part, or else that she was prevented from performing it by the testator or those acting for him.

4. Where the plaintiff agreed to remain with her father and work for him during his life time, and in consideration thereof he agreed to devise her one-fourth of his estate, evidence that fifteen months before his death, the plaintiff married and removed to another State, is an abandonment of the contract, and she could only recover on the contract by showing some legal excuse for non-performance, and her testimony that she did not go back after she got married, they did not want her to go back, would not justify a finding that she was prevented by her father from performing the contract.

5. A party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a non-performance thereof.

6. While in some cases, a recovery is permitted upon a *quantum meruit*, when a recovery could not be had upon the contract for the contract price, yet no recovery can be had for the contract price unless the contract has been performed.

ACTION by Della Tussey and her husband against L. A. Owen, Executor of Anderson Owen, deceased, heard by *Judge B. F. Long* and a jury, at the August Term, 1905, of the Superior Court of DAVIDSON County.

This is an action to recover on a specific contract or agreement set out in the complaint for services rendered by plaintiff Della, to her father, Anderson Owen. The material allegations of the complaint are denied in the answer. The issues and responses were as follows:

1. "Did the testator, Anderson Owen, make the agreement with the plaintiff, Della Owner, to pay her at his death for her services as alleged in the complaint? Answer. Yes.

2. "Did the plaintiff, Della, render the services to her father agreeably to said contract as alleged in the complaint? Answer. Yes.

3. "What, if any, is the value of such services? Answer. $1,500."

From the judgment rendered, the defendant appealed.

Watson, Buxton & Watson and *Walser & Walser* for the plaintiffs.

E. E. Raper for the defendant.

BROWN, J. The cause of action as stated in the complaint, as well as by counsel for plaintiff on the argument, is substantially that plaintiff, Della Tussey, the daughter of Anderson Owen, she being then of age, and unmarried, agreed to remain with her father and work for him during his life time and that in consideration thereof he agreed that at his death he would devise her one-fourth of all his lands and personal estate; that she performed the contract on her part and that her father made a will carrying out the contract on his part, but afterwards added a codicil in which he revoked the will so far as he had willed the said property to the *feme* plaintiff, and devised all his estate to his wife and his two sons, thereby failing to carry out the contract.

The complaint fails to allege in specific terms that the *feme* plaintiff fully performed the contract upon her part or that she was prevented from performing it by the testator or by those duly authorized to act for him. Therefore if it is deemed advisable to try this case again, the complaint should be redrafted as to those particulars or properly amended. There is some objection to the form of the third issue. It should be, "What sum, if any, is plaintiff entitled to recover?"

If the contract, as alleged in the complaint, be established, its breach is admitted by the facts stated in section 6 of the answer, but the burden is still on the plaintiff to establish the performance of it on her part, or else that she was prevented from performing it by the testator, or those acting for him.

That the *feme* plaintiff, Della, did not perform the contract is fully established by all the evidence, including her own. A fair interpretation of the contract set out required her to remain with her father and serve him until his death, as he was old and afflicted. She failed to do that. On the contrary she was married March 11, 1903, and immediately removed to Chattanooga, and returned only after her father died. He lived for fifteen months after her marriage and removal to Chattanooga and only added the codicil to his will after that event, viz., on January 18, 1904. In view of these facts the plaintiff can only recover upon the contract by showing some legal excuse; as that she was prevented from performing the contract by her father or those authorized to act for him. As the marriage and removal to Chattanooga were voluntary acts upon her part, the evidence that she was prevented from performing the contract would have to antedate such events, so as to justify her apparent abandonment of it. The *feme* plaintiff testified: "I did not go back after I got married. They did not want me to go back." That statement alone would not justify a finding that she was prevented by her father from performing the contract.

The pleadings have been framed and the case tried upon the theory that a specific contract (not an implied one) had been entered into between the plaintiff and her father; that she performed it, and that there was a breach of it upon his part. Therefore it is unnecessary to review the numerous cases which have come before this court as to when a contract will be implied between parent and child, that the former will pay the services rendered by the latter after attaining full age. The jury have found the first issue as to the agreement in favor of the plaintiff, and there was evidence to support such finding. But the record fails to disclose any evidence whatever to justify the response to the second issue, to-wit: that she performed the contract upon her part. "The proposition is too plain to need any reference to authority in its

support, that a party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a non-performance thereof." *Smith, C. J.*, in *Ducker v. Cochrane*, 92 N. C., 597.

His Honor instructed the jury: "If you find that the contract was that he would pay her one-fourth of his estate at his death for her services, you will consider all the evidence offered on that question and determine what the value of the one-fourth of the estate is, and make your answer to the third issue from the facts as you find them to be." The defendant excepted. This instruction cannot be sustained in view of the fact that the plaintiff failed to perform the contract. Under the form of the third issue, it is practically a judicial determination that the value of her services equals one-fourth of the testator's estate.

There is a class of cases, where under some circumstances the rigor of the common law rule has been relaxed, and a person has been permitted to recover the actual value of his services, although failing to perform the entire contract on his part. In some cases, the law implies a promise to pay such remuneration as the benefit conferred is really worth. *Dumalt v. Jones*, 23 Howard, U. S., 220. But we know of no authority to support the claim that the plaintiff could recover the full contract price, unless she had performed the contract. *Chief Justice Smith* quotes a number of such cases in *Chamblee v. Baker*, 95 N. C., 100, but he also quotes with approval from the opinion in *Munroe v. Phillips*, 8 Ellis & *Black*, 739: "The inclination of the courts is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract, nor for the value of the work done, because the special includes an implied contract to pay. In such case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. Accordingly, restrictions

are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when by the nature of the agreement, or by *express* provision, nothing is to be paid *till all is performed.*"

The general rule is laid down in *Cutler v. Powell,* 2 Smith L. C., 1: "But if there has been an entire executory contract and the plaintiff has performed a part of it, and then wilfully refuses without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special *assumpsit.*" This rule has been repeatedly recognized and acted on by this court. *Thigpen v. Leigh,* 93 N. C., 47; *Lawrence v. Hester, Ibid,* 79.

Some of the cases cited may have been modified so as to permit a recovery upon a *quantum meruit,* when a recovery could not be had upon the contract for the contract price.

But the authorities are uniform that no recovery can be had for the contract price unless the contract has been performed and that is the ground upon which we put our decision.

For these reasons we think the motion to nonsuit should have been allowed.

Error.

LINDSAY v. AUSTIN.

(Filed November 7, 1905).

Ejectment — Locating Boundaries — Reversing Calls — Instructions —Evidence —Adverse Possession —Statute of Limitations—Grants.

1. The general rule is that in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line.

2. Where in the calls of a deed "Beginning at a red oak, John Mullis's corner, about 60 links from said branch and runs north 53 degrees, east 2 chains and 42 links, to a post oak, Jenkins's corner; then north 73 degrees, east 20 chains, to a pine, Jenkins's other corner; then north 47 degrees, west 10 chains to a large rock," etc., there was no evidence to locate the red oak, called for as the beginning, nor the post oak called for as the second corner, but there was evidence to locate the "pine Jenkins's other corner" and the "large rock," an instruction that if the jury find that the large rock is one of the natural objects, etc., "then the plaintiff had the right to reverse the calls in the grant and run from said rock to find the beginning corner," was proper.

3. In an action of ejectment, where plaintiff showed possession out of the State by a registered grant made in 1822, and *mesne* conveyances to themselves, with evidence of possession in 1866 and 1867 and from 1889 to 1896, a motion to nonsuit was properly denied, where the action was brought in 1902 and the defendant's possession under color did not become exclusive until 1896.

4. In an action of ejectment, where at the date of a grant from the State to the defendant, the plaintiffs had failed to show title out of the State either by possession or grant, and also failed to show seven years' possession under color of title since the date of that grant, the court erred in refusing to nonsuit the plaintiffs.

ACTION by R. E. Lindsay and others against John M. Aus-

tin, heard by *Judge Walter H. Neal* and a jury, at the August Term, 1905, of the Superior Court of UNION County.

This was an action of ejectment to recover two tracts of land. The court submitted the following issues:

1. Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Ans. Yes.

2. Was the defendant in the possession of the lands at the time this action was brought? Ans. Yes.

From the judgment rendered upon the verdict, the defendant appealed.

Adams, Jerome & Armfield for the plaintiffs.
Redwine & Stack for the defendant.

BROWN, J. The plaintiffs claim two tracts of land, containing five and one-half, and thirty-five acres, the former under certain deeds and the later under a grant to William Mullis, dated 1822, and through *mesne* conveyances to themselves. The defendant claimed under an entry made in 1889 and a grant issued in 1890, and undertook to show continuous adverse possession from February, 1889, to the time of trial. The record in the case presents thirty-five exceptions, to which we have given consideration, notwithstanding a large number of them seem to have been abandoned, or not noticed by the defendant in his brief.

The defendant's principal exception is to His Honor's refusal to nonsuit the plaintiffs upon the evidence. This exception cannot be sustained as to the thirty-five acre tract. As to that tract, plaintiffs showed a grant in 1822 to William Mullis, registered between 1819 and 1824; a deed from Lindsay, executor, to Mary J. Lindsay, registered April 20, 1881; a deed from Griffing, commissioner, to J. F. Austin, registered December 21, 1885, and *mesne* conveyances to the plaintiffs. The title being out of the State, the plaintiffs showed evidence of possession in 1866 and 1867, and again

from 1889 to 1896. The defendant entered this land in 1889, and a grant was issued to him in 1890, and he remained in possession of a part thereof until the time of the trial, but S. C. Criscoe, a co-tenant with the plaintiffs, was in possession of a part of the land from 1889 to 1896, and the defendant's possession did not become exclusive until after Criscoe left in 1896, and he was in possession under color, from 1896 until the time this action was brought in 1902, which was not sufficient to ripen his title.

Of the other exceptions insisted upon by the defendant, we deem it proper to consider the tenth and eleventh, which relate to the location of the William Mullis grant, upon the locating of which, plaintiff's title to the thirty-five acre tract depends. The court instructed the jury as follows:

"If the jury find from the greater weight of evidence that the large rock pointed out on the plat at C is one of the natural objects in the line of the boundaries of the grant to William Mullis, then the plaintiffs had the right to reverse the calls in the grant, and run from said rock to find the beginning corner."

This instruction was given at the request of the plaintiffs and the defendant excepted.

The calls of the William Mullis grant are: "Beginning at a red oak, John Mullis's corner, about 60 links from said branch and runs north 53 degrees east, 2 chains and 42 links, to a post oak, Jenkins's corner; then north 73 degrees east, 20 chains to a pine, Jenkins's other corner; then north 47 degrees west, 10 chains to a large rock; then north 9 degrees east, 18 chains and 50 links, to Pinion's corner stake, one post oak and pine pointers; then, with Pinion's line, south 51 degrees west, 22 chains and 50 links to Weatherford's branch; then down the various courses of said branch to the beginning." The surveyor testified in substance that he failed to find any evidence to locate the red oak, John Mullis's corner, 60 links from Weatherford's branch, which is the be-

ginning corner of the William Mullis grant; that he also failed to find any evidence of the post oak at the end of the course north 53 east, 2 chains and 42 links to a post oak, Jenkins's corner, and failed to locate by evidence Jenkins's corner. The surveyor further testified that he did find the pine stump on the course reading north 73 east, 20 chains to a pine and that there was a solid line to the pine stump, "Jenkins's other corner." The next call is north 47 degrees west, 10 chains to a large rock, etc. The surveyor testified that he found this rock; that it was three feet out of the ground, permanent and immovable; and that in order to locate the beginning he started at this rock and reversed the call and went to the pine stump, "Jenkins's other corner." He further testified as follows: "We then put on the variation and started for that corner on the branch. We reversed the call and it led us to that corner marked, no corner found, 2 chains and 50 links from the beginning corner, that is where our distance gave out. We then reversed the first call and adjusted bearing and that carried us to the beginning corner, there to the red oak." He was asked, "What distance was that as marked on the plat?" and answered, "I have it marked 252; I believe one grant has it marked 242 and another 252. As best I remember it the deeds differ 10 links." He was also asked, "Mr. Mullis, you found the pine at Jenkins's corner at B, and went back to the beginning by reversing the corner to Jenkins's corner, to the pine stump, then to the beginning corner and reversed the run from the large rock?" He answered, "Yes, sir, with the adjusted bearing." The defendant contends that under the evidence it was not permissible to locate the beginning corner by reversing the courses from the large rock as was done by the surveyor, and that therefore the plaintiffs have failed entirely to locate the William Mullis grant. The general rule is that in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of

reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. There are exceptional instances in which it is manifest that reversing a line is a certain means of ascertaining the location of a prior line. In *Duncan v. Hall,* 117 N. C., 446, it is said by *Justice Avery,* "that the general rule is an established law of evidence adopted as best calculated to ascertain what was intended to be conveyed, and it is incumbent on a party asking the court to depart from it to show facts which bring the particular case within the exception to the rule." It appears from the evidence of the surveyor that there is no evidence to locate the red oak called for as the beginning or the post oak called for as the second corner. Plaintiffs contend that the pine, Jenkins's other corner, and the large rock called for, have been located and ascertained and that in the absence of any evidence as to the first and second corners, to-wit: the red oak and the post oak, Jenkins's corner, the grant can be located only by the method adopted by the surveyor, and that such method furnishes a certain means of locating it with accuracy. Under these circumstances we think the authorities support the charge given by the court. In this case the evidence tends to prove that the large rock called for is a permanent and immovable object three feet above ground, and that it is the rock called for in the William Mullis grant. The evidence also tends to establish the location of the pine, "Jenkins's other corner." Reversing the course and distance from the rock brought the surveyor to this corner and by following thence the reversed course, properly adjusting the bearing by allowing the variation, the surveyor states he was enabled to locate the beginning. In *Dobson v. Finley,* 53 N. C., 498, *Chief Justice Pearson* says: "Supposing the pine to be established as the second corner, could the first, a beginning corner, be located by reversing the course and measuring the distance

called for, from the pine back, that is, on the reversed course? His Honor ruled that the beginning corner could be fixed in this way; we agree with him. If the second corner is fixed, it is clear, to mathematical certainty, that by reversing the course and measuring the distance, you reach the first corner; so there is no question about overruling either course or distance by measuring the line, and the object is to find the corner by observing both course and distance." In *Harry v. Graham,* 18 N. C., 77, *Chief Justice Ruffin* says: "For example, if this deed had said that the line from the corner chestnut and red oak ran to a black oak near the patentee's other line and gave neither course nor distance, or only one and *thence* north 45 degrees, east 220 poles to a post oak, his own and Beard's corner, the line might be reversed from the post oak to ascertain the corner of that and the next preceding line, because that affords *the only evidence* (the black oak not being found, or its locality otherwise identified) of the point at which the one line terminated and the other began."

We think His Honor's charge is justified by the eminent authorities we have cited. If the large rock and the pine, "Jenkins's other corner," are located to the satisfaction of the jury, we see no reason why the method pursued by the surveyor, in following the reversed course, with proper adjustment, should not establish the beginning corner with reasonable certainty. We see nothing in *Norwood v. Crawford,* 114 N. C., 518, which militates against the position that this is a proper method of determining the beginning corner of this grant. There is testimony upon the part of the surveyor tending to prove that there was a solid line to the pine stump, being "Jenkins's other corner;" that he found the pine stump there. When he found the large rock and reversed his course, with proper adjustment, it carried him back to "Jenkins's other corner," and by continuing the reversed course it should bring him back to the beginning. The conditions seem to be present in this evidence which would

make this case one of the exceptions mentioned in *Duncan v. Hall, supra.* There is an entire absence of any proof of a red oak about sixty links from the branch or of John Mullis's corner. There is also no proof of the location of a post oak, being Jenkins's corner, but there is proof of the location of the pine at "Jenkins's other corner," and there is evidence locating the large rock mentioned in the grant as the terminus of the third line. These conditions, we think, justified the surveyor in reversing his line from the large rock back to "Jenkins's other corner," and then continuing the reversed line and thereby locating the beginning. We think, therefore, His Honor properly refused the 14th and 15th instructions tendered by the defendant, which were practically requests to instruct that the grant had not been located.

We think His Honor erred in respect to the title to the 5½ acre tract. The plaintiffs showed no grant to themselves or to any one under whom they claimed for that tract. The plaintiffs offered evidence of possession of this tract during the years of 1866 and 1867, and from that time until 1889 there is no evidence of actual possession, consequently the possession followed the legal title which was in the State. Plaintiffs also offered evidence of possession from 1889 to the fall of 1896, and for the purpose of showing title out of the State relied upon the grant from the State to John M. Austin, dated December 19, 1890. The right of the defendant to this 5½ acre tract did not accrue until the date his grant was issued. At that time the title was in the State, the plaintiffs having failed to show title out of the State either by possession or grant. Inasmuch as the right of the defendant to sue did not accrue until December 19, 1890, and as his grantor, the State, was not barred, the seven year statute (sec. 141 of The Code) did not begin to run until the date of his grant. Therefore, the plaintiffs have failed to show seven years' possession under color of title since the date of that grant. *Hamilton v. Icard,* 114 N. C., 542.

The judgment of the Superior Court in respect to the 35 acre tract is affirmed. As to the 5½ acre tract the judgment is reversed and a new trial is awarded. Let the costs of this court and the appeal be divided equally between the plaintiffs and defendant.

Partial New Trial.

KEARNS v. RAILROAD.

(Filed November 15, 1905).

Railroads — Collisions — Negligence — Proximate Cause — Nonsuit — Sufficiency of Evidence — Burden of Proof.

1. It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff.

2. In an action for damages for an injury from a collision, evidence which merely shows that it was possible that the failure to stop the train caused the injury, or merely raises a conjecture that it was so, is legally insufficient and should not be submitted to the jury.

3. In an action for damages for an injury from a collision, with defendant's train, the burden of proof was upon the plaintiff to show that the alleged negligence of the engineer in not stopping his train sooner than he did was not only the cause, but the proximate cause of the injury.

4. Evidence that the plaintiff, driving his horse and buggy, crossed the defendant's track and after he had gotten across and when distant from 15 to 40 feet and about the time the engine passed the crossing, the horse began to back and continued backing and backed into the cars; that the engineman was looking out at the plaintiff and slackened the speed of the train, which was going very slowly and after plaintiff's buggy struck it stopped very quickly, in 15 feet of the crossing according to one witness, and within two or three car lengths according to the plaintiff, *held*, that the plaintiff failed to make out a case of actionable negligence.

HOKE, J., and CLARK, C. J., dissenting.

KEARNS *v.* RAILROAD.

ACTION by Alexander Kearns against Southern Railway Co., heard by *Judge B. F. Long* and a jury, at the August Term, 1905, of the Superior Court of DAVIDSON County.

This action was commenced on December 7, 1904, to recover damages for an injury alleged to have been received by plaintiff on August 17, 1902, by coming in contact with a train of the defendant at Thomasville. At the conclusion of the evidence, His Honor, *Judge Long*, being of opinion that the plaintiff had failed to make out a case of actionable negligence, sustained defendant's motion to nonsuit, and dismissed the action. The plaintiff appeals.

McCrary & Ruark for the plaintiff.
Manly & Hendren for the defendant.

BROWN, J. The duty of the judge to nonsuit when the evidence is not legally sufficient to justify a verdict for the plaintiff, is too well settled to admit of dispute. It is the law in this State, long since declared by this court and recognized by the General Assembly. It is also the rule of practice in every court where the practice and principles of the common law prevail.

"We would be recreant to our duties as judges were we to fail to declare the law with respect to the question whether there is any evidence for fear of offending the jury. This question the jury do not decide." *Connor, J.*, in *State v. Smith*, 136 N. C., at page 687.

Evidence has a twofold sufficiency, a sufficiency in law and a sufficiency in fact. Of the former, the court is the exclusive judge; of the latter, the jury is. The measure and quantity of proof is a question for the court. When submitted to the jury, its weight and sufficiency to establish a fact is for them.

An issue is made up of one or more facts. Where the evidence fails to establish all these facts, either directly or by

rational deductions, as where there is a failure of evidence in respect to any material fact involved in the issue, then the evidence is not legally sufficient to justify a finding upon the issue it is offered to sustain, and it becomes the plain duty of the judge to instruct accordingly, for in such case the jury has no duty to perform.

We agree with His Honor that the plaintiff in this action has failed to make out a case of actionable negligence. To establish actionable negligence the plaintiff must show by the greater weight of evidence, not only that the engineman was guilty of some negligent act, but also that such negligent act was the proximate cause of the injury. As clearly expressed by *Mr. Justice Walker:* "There must always, in actions of this kind, be a causal connection between the alleged act of negligence, and the injury which is supposed to have resulted therefrom. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established, and the negligent act of the defendant must not only be the cause, but the *proximate* cause, of the injury." *Byrd v. Express Co.* (at the present term).

The burden of proof is therefore upon this plaintiff to show that the alleged negligence of the engineman in not stopping his train sooner than he did was not only the cause, but the proximate cause of the injury. The law requires him to establish that fact by a clear preponderance of proof as much so as it does the fact of negligence. The proof must be of such strength and character as to warrant the inference that the failure to stop caused the injury, and not merely to raise a surmise or conjecture that such was the fact. Evidence which merely shows that it was possible that such was the result, or raises a conjecture that it was so, is legally insufficient, and should not be submitted to the jury. *State v. Vinson,* 63 N. C., 335; *Brown v. Kinsey,* 81 N. C., 245.

"The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success." *Byrd v. Express Co., supra.*

Applying these well settled principles, we have concluded that the plaintiff has failed to show that the alleged negligent act of the engineman in not stopping his train sooner than he did caused the injury, and therefore he cannot recover.

The facts, as gathered from the testimony of the plaintiff and his witness, Elliott, who alone testified as to the occurrence, are these: On August 17, 1902, plaintiff, driving his horse and top buggy, crossed the defendant's tract in the town of Thomasville. After he had gotten across, and when distant from 15 to 40 feet from the track crossing, and about the time the *engine* passed the crossing, the horse began to back and continued backing and backed into the cars, about the second or third coach. Plaintiff testifies: "I had just crossed the track and the horse began to cut up and ran back and backed the right wheel against the cars and threw me between the shafts and the horse, under his feet. The first time I saw the train the horse wheeled right around towards Lexington and cut up and I could not see anything. I was something over the length of the horse and buggy when train came along the track." Plaintiff states that then the horse began to back and he urged him forward. "I do not know as I said my horse was an old fool, but *she was an old fool* or else she would not have run back that way." Elliott testified in substance that about the time the engine passed the crossing the horse began to back and kept on backing and backed into the train. The engineman was looking out at plaintiff and his horse. He slackened up the speed of the train. It was going at a very slow rate of speed. The engine, tender and several cars had passed before plaintiff's buggy struck the train. He also testified that the train stopped very

quickly, but he did not hear the brakes applied, being 150 feet distant. The train was going *very slowly,* and after plaintiff's buggy struck it stopped very quickly. He further stated that the engineman shut off steam and slowed up when he saw the horse backing. The engineman could not have seen the horse "cut up" before the engine got on the crossing, because the horse did not begin to back and "cut up" until then. Witness said that he could see the engineman looking out of his window. "He was going very slowly, looking at this man. Stopped very quickly. Went about ten or fifteen feet, apparently holding his train under control, looking at this situation."

In view of the fact that the engineman was on the crossing with his engine when he saw the horse commence to back, and brought his train to a standstill in 15 feet of the crossing according to the witness, Elliott, and within two or three car lengths, according to plaintiff, it is very doubtful if there is any negligent conduct upon the part of the engineman disclosed by the evidence. But, assuming there is such evidence, in our opinion there is nothing which tends to prove that the alleged negligent conduct caused the damage to the plaintiff or his buggy. This is not a case where the train ran over or backed into the plaintiff, but where the plaintiff backed into the train. While there is no evidence offered that the engineman could have stopped his train any sooner than he did after first seeing the horse "cut up," yet, assuming that he could have done so and that the train was at a standstill at the moment the horse backed the right buggy wheel into the car, we think no rational inference can be drawn that the result to the plaintiff and his buggy would have been otherwise than it was. There is no affirmative proof whatever that the stopping of the train a moment sooner would have prevented the contact with the buggy wheel or the resultant injury. In view of the lack of evidence, to submit that question to the jury would be to refer it to the domain of guesswork and con-

jecture for solution. The engine was on the crossing when the horse began to back. That was the earliest moment that the engineman could have discovered plaintiff's situation. Suppose he had stopped his engine and train instantaneously (although we do not know it to be possible), what would have been the evident consequence to the plaintiff? His horse would have backed his buggy into a hissing and steaming engine, a much more dangerous predicament. There is no evidence that the engineman could have so quickly reversed his engine as to back it out of plaintiff's way, and that was hardly possible in so short a time. There is not the slightest evidence that the car steps caught into the wheel and dragged the buggy any distance, or that the wheel struck the steps, as alleged in the complaint. When the frightened horse backed the right hind wheel against a very slowly moving car, it was well calculated to "smash the wheel" and pitch the plaintiff out between the shafts and horse by the force of the impact alone, and not because the car was moving. The same result would doubtless have happened had the horse backed with the same force against a stone wall. If the train had been moving rapidly, its momentum might possibly have drawn the buggy and its occupant under it when the horse backed the buggy into it. On the contrary, it was moving with such exceeding slowness that it came to a full stop very quickly, almost immediately after the contact, so that some person safely alighted and got hold of the horse's head, and the plaintiff was pitched forward instead of backwards or alongside or under the cars. The plaintiff has failed to establish by evidence any circumstances from which it can be fairly inferred that there is reasonable probability that the accident resulted from the failure of the engineman to stop the train sooner than he did, assuming that he could have done so, which is by no means certain. The plaintiff has failed to show that the alleged negligence was, in the expressive language of *Mr. Justice Hoke,* "the cause that produced

the result in continuous sequence and without which it would not have occurred; and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Ramsbottom v. R. R.*, 138 N. C., at page 41.

We are of opinion that the proximate cause was (to quote the language of the plaintiff) "the old fool horse."

Affirmed.

HOKE, J., dissenting: I differ from the court in its decision of this case, and while no question of law is seriously involved, the difference as to its application to the facts before us, is sufficiently pronounced to justify some statement of the reasons for my dissent.

It is accepted law in actions of this character that when two men of fair minds can come to different conclusions on the question of actionable negligence, the jury must determine the issue; and that this applies not only to the negligent act, but to the question of proximate cause.

It is also the better doctrine that where the negligent act has been established or admitted, it is only in clear and exceptional instances that the question of proximate cause should be withdrawn from the jury and determined by the judge.

Shearman & Red., Neg., vol. 1, sec. 52; Thompson's Com. on Law of Neg., vol. 1, sec. 161.

Another position may be considered as established; that when a judge withdraws a case from the jury by directing a nonsuit, the evidence favoring the plaintiff must be taken as true. *Hopkins v. Railroad*, 131 N. C., 464; *Biles v. Railroad*, at this term.

The court does not seem to have been altogether advertent to this last principle; for, in the opinion, apparent consideration is given to evidence favoring the defendant in certain phases of the case where there was other evidence contradictory or qualifying which was more favorable to plaintiff.

This matter is not dwelt upon at much length, or in greater detail for the reason that in any aspect of the case, I am of opinion that the ruling of the judge below cannot be sustained.

Applying the above rules to the facts before us, as I understand them: Here was a man over 80 years of age, in a top-buggy, who had just driven over a crossing of defendant's railroad, when a passenger train of defendant company passed the crossing, going north. The railroad ran about north and south here. The plaintiff had just driven over, being something over the length of the horse and buggy, as he states it; was from 15 to 20 feet from crossing, as the witness Elliott states it; and as the train went by the crossing, the horse commenced backing the buggy towards the train. The road sloped upward some towards the crossing, and as the train moved on, going the distance of several car lengths, the horse continued to back the buggy up the slope, till the train and the buggy collided. The right hind wheel of the buggy was crushed down; the old man thrown from his seat on to the fore wheel, falling under the shafts, between the horse's heels and received severe injuries, from which he still suffers. During the time the horse was backing, the engineer was looking directly at him. A collision was evidently imminent for some one jumped from the train and caught the horse by the bridle in an effort to avoid the catastrophe, "but the train moved on." The witness, Elliott, a merchant in Thomasville, who had no interest in the matter, so far as appears, and who had the entire occurrence in full view, at a distance of not more than 134 feet from the center of the crossing, testifies in part, as follows: "To the best of my recollection, about the time the engine passed the crossing, the horse began to back and kept on backing and backed into the train. I saw the engineer looking out of the window, and some one else stepped from the train. The engineer was looking at Mr. Kearns and his horse. He apparently 'kinder'

slacked up the speed of the train; it seemed so. Then he kept looking back after the engine had passed, and just after he struck the train, he put on brakes and stopped the train. It was going at a very slow rate of speed. The engine, tender and several cars had passed before he struck it. I don't know the manner in which the train was stopped. I know it stopped very quickly * * * The train was going along very slowly, not trying to make good time, and after it struck, it stopped very quickly * * * It seemed that he slowed up after he saw the horse start to backing; he 'kinder' shut off steam, apparently. The train stopped very quickly after he was hit. I saw Kearns. I do not know how badly he was hurt * * * I live on the south side of the track. That is the side the engineer was on. I could see him looking out of his window. He was going very slowly, looking at this man. He stopped very quickly. He went about 10 or 15 feet. He was apparently holding his train under control, looking at this situation * * * The horse's head was pointed south and when he commenced going back, he gave a cut and went back against the train; his head was in a westerly direction. The horse and buggy were going backward * * * It was just an incline; I do not know what degree; 10, 15 or 20 degrees. It was a gradual incline down to where the horse was."

There are several points in the testimony of this witness which may be noted as a help to the true understanding of the matter. Thus, "I saw the engineer looking out of the window, and some one else stepped from the train. * * * The engineer was looking at Kearns and his horse; he apparently slacked the speed of the train. It seemed so. Then he kept looking back, and just after he struck the train, he put on brakes and stopped the train * * * The train stopped very quickly after he was hit * * * He stopped very quickly; went about 10 or 15 feet. He was apparently holding the train under control, watching the situation."

These facts make out a clear case of negligence. The engineer in the exercise of ordinary prudence, should have stopped the train when he saw that a collision was imminent; it is almost equally as clear that the movement of the train had something to do with the nature and extent of the injury.

The opinion substantially admits that there was negligence in not stopping the train outright, and sustains the ruling of the court below on the ground that there is no evidence that the motion of the train had anything to do with causing the injury; and that this is so clear there can be no two opinions about it among fair minded men.

A dissertation on the momentum possessed by bodies of vast weight and tremendous power, though moving slowly, might be of service here, but I find it difficult to discuss this last position with that seriousness which is always becoming when making final deliverance on the rights of parties and which the great respect entertained for my brethren always prompts. To hold that the movement of the train, though negligent, had nothing to do with causing or contributing to the plaintiff's hurt, to my mind involves the proposition that when a 400,000 pounds train in motion collides with a 300 pounds buggy and a 900 pounds horse also in motion, in which the wheel of the buggy is crushed down and the occupant thrown from his seat, causing him to fall beneath the horse's heels, the motion of the train had nothing whatever to do with intensifying the shock or increasing the damage, and that this is so clear that there can be no two opinions about it.

The reasons given in support of the position are no more satisfying than the position itself. It is urged that the train was going "slowly, very slowly." This is a comparative term and does not mean the same thing when speaking of trains as in slower methods of locomotion. Thus, the witness, Elliott, says at one place, "It was going along very slowly, not trying to make good time." However this may be, it was

going forward faster than the horse was backing, for it had gone three or four car lengths while the horse had backed from 15 to 40 feet. It is also suggested that there is not the "slightest evidence that the car steps caught in the wheel and dragged the buggy any distance, or that the wheel struck the steps, as urged in the complaint." No, the evidence is silent on these points. No one seems to have noted just what part of the car came in contact with the buggy, nor which way the wheel was dragged. The first point was probably considered of no consequence, and any evidence on the second was more than likely effaced in the crush and wreck of the offending wheel.

It is also repeated, in aid of the defendant's engineer, that after the collision the train was stopped very quickly, but I cannot see how that can help the defendant. The train had gone 10 or 15 feet beyond the point of contact, and stopping it quickly only tended to show that the engineer had his train under full control and could readily have stopped in time to avoid the injury if he had so desired. As to the plaintiff, the injury had been already done, and the train could have proceeded on its way north and not added one whit to the plaintiff's grievance or his injury.

It might be suggested in support of plaintiff's position as a matter of common observation, that under all the conditions described by this testimony, a buggy could have backed up that incline at the rate described, against a stationary object, and it would not have crushed a buggy wheel of ordinary strength one time out of ten, or even one hundred; the only other element present was the motion of the train, and the strong probability is that this motion either caused, or greatly intensified the injury.

It would seem almost to permit the application of the principle *res ipsa loquitur* and that neither evidence nor further argument is required. I agree with my brethren that there

cannot well be two opinions on the question, but the conclusion should be the other way.

CLARK, C. J., dissenting: I concur in what is so admirably said by *Mr. Justice Hoke*. Whether the proximate cause of the plaintiff's injury was his owning a "foolish" little horse, over which he lost control, and which backed the buggy and its occupant up a steep hill against the car, or whether it was the act of the defendant's servant in crushing into the buggy with the energies of steam and the weight of a heavy train of cars, which, notwithstanding he had under perfect control, and with full knowledge that the plaintiff could not control his horse, was a matter of fact eminently for a jury to decide. If "only one inference could be drawn" it would be that the proximate cause was the vastly greater power of steam which was under the control of the defendant's servant. In this collision between the backing horse and the moving train, not only was the impact of the latter the greater force, but there was negligence on the part of the defendant and none on the part of the plaintiff. How much of the damage was due to the neglect and default of the defendant was a matter which only a jury can determine. If there had been no negligence by the defendant, the injury would have caused it no liability, but the defendant's negligence is clear. In *Craft v. Railroad,* 136 N. C., 49, the court holds that "on a motion for nonsuit the evidence of the plaintiff must be taken as true and construed in the light most favorable to him, and if there is more than a scintilla of evidence tending to prove the plaintiff's contentions, the question must be left to the jury, who alone can pass upon the weight of the testimony and the credibility of witnesses." To the same purport are *Cox v. Railroad,* 123 N. C., 604; *Coley v. Railroad,* 129 N. C., 407; 57 L. R. A., 817; *Hopkins v. Railroad,* 131 N. C., 463, and *Butts v. Railway,* 133 N. C., 82.

In *Purnell v. Railway,* 122 N. C., 832, the court holds that "a motion of nonsuit is substantially a demurrer to the

plaintiff's evidence * * * Every fact which the plaintiff's evidence proved or tended to prove must be taken by the court to be proved. It must be taken in the strongest light as against the defendant." The same view is taken in *Printing Co. v. Raleigh,* 126 N. C., 516; *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck,* 99 N. C., 551; 6 Am. St. Rep., 552. And in *Snider v. Newell,* 132 N. C., 614, *Connor, J.,* speaking for the court, says: "The demurrer to the evidence admits the truth of the plaintiff's testimony, together with every reasonable inference to be drawn therefrom most favorable to the plaintiff. *Brittain v. Westhall,* 135 N. C., 492."

The theoretical proposition that the only inference which could reasonably be drawn was that the *causa causans* lay with the little horse, backing buggy and driver up hill, is met by the fact that two members of this court draw a different inference. There is no place to apply a theory when the foundation fact, which would deprive the plaintiff of the sacred right of trial by jury, is lacking.

The Constitution, Art. I, sec. 19, declares that "the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The guaranty of the right of trial by jury is traced back with pride to the words of Magna Charta, "*legale judicium parium suorum.*" The disparity of power between John and his armed barons was not great, and indeed at Runymede, the latter were the stronger. If the right of trial by a jury of one's peers should have been guaranteed to the barons against the king, certainly it should be still more sacred when the controversy, as here, is between a citizen of humble means more than 80 years of age, on the one hand, and on the other a powerful corporation with its roads extending into many States, with (as we know from the official reports of both State and Federal governments) nearly $50,000,000 of annual receipts, more than $16,000,000 of which are in excess of its operating expenses, and with influence extending to

every sphere of activity, State and Federal. If ever the right of trial by jury should be held sacred, it is between litigants of such disproportionate power.

Constitutional guaranties, like that of a trial by jury, are the necessities of the weak and humble. The great and powerful can get their dues (if not more) without such aid. Therefore, such right should be always sacredly guarded and never dispensed with. If a judge can dispense with a jury trial because he thinks that upon the evidence the verdict ought not to be in favor of the plaintiff, then the judge, not the jury, tries the case and weighs the evidence, whether it is "reasonably sufficient" to justify a recovery. Why carefully forbid the judge to express an opinion "whether a fact is fully or sufficiently proved," Code, sec. 413, if the judge can decide that the "evidence is not sufficient" to justify a verdict for the plaintiff and refuse to submit the cause to the jury.

The ancient landmark was that if there is "any evidence beyond a scintilla" either party has a right to have the jury pass upon the evidence, leaving it to the judge in the interest of justice to set aside the verdict if palpably erroneous. *Jordan v. Lassiter,* 51 N. C., 133. This was fully debated and reiterated in *Wittkowsky v. Wasson,* 71 N. C., 451, where *Bynum, J.,* with great foresight and to his lasting honor, in a dissenting opinion of great force, combatted the "new and dangerous proposition" as he termed it, which was intimated by the majority opinion that "any evidence" could be construed to mean such "as reasonably to satisfy the jury." As he clearly perceived and earnestly insisted, this would take the right of trial by jury out of the rank of a constitutional guaranty and make it discretionary with the judge.

"Power is ever stealing from the many to the few." Here, two out of five members of this court are of opinion that there was not only evidence, but indeed that the weight of the evidence was in favor of the plaintiff. The counsel for the de-

fendant railroad evidently thought that the jury would also find the facts against him, else he would not have been so anxious to prevent their being submitted to the jury. In the differing opinion of the members of this court as to what the evidence proves, the actual and real result is that the defendant is exonerated by the opinion of a bare majority of five men as to the weight of evidence, and the plaintiff does not receive the benefit of his constitutional right to have the weight of the evidence passed upon by a jury of twelve men "of the vicinage." Yet in cases of any doubt, the citizen should always be granted the protection claimed.

IN RE WILL OF ELIJAH POPE.

(Filed November 15, 1905).

Wills—Subscribing Witness.

Where a witness to a will held the pen while his entire name was written, *animo testandi*, at the request of the testator and in his presence, he is an effectual subscribing witness, and this is not affected by the fact that such witness was at the time able to write his own name.

Issue devisavit vel non, on a paper writing propounded as the will of Elijah Pope, deceased, transferred from the clerk, and heard by *Judge B. F. Long* and a jury, at the January Term, 1905, of the Superior Court of IREDELL County.

There was testimony to the effect that there were present at the execution of the paper, the alleged testator, D. J. Fulbright, a justice of the peace, Martin Miller, Candace Pope and Charlie Pope.

D. J. Fulbright prepared the paper and same was signed by Elijah Pope as his last will and testament in the presence

of two witnesses; Martin Miller signed his name as subscribing witness and then wrote the name of the other witness, Candace Pope, who "helt" the pen while this was done, and who had been requested by the testator to subscribe as the other witness.

Martin Miller, one of the subscribing witnesses, testified to the execution of the paper writing by Elijah Pope, and that he signed as subscribing witness, and in reference to Candace Pope, who signed as witness, said: "Candace asked me to write her name. She had hold of the pen all the time I was writing her name. She and the old man asked me to write her name." Candace Pope testified: "I am daughter of Elijah Pope and lived with him. I was there the latter years of his life. Mr. Fulbright came over; father sent for him; got there about dusk; Martin Miller was there. Father signed the paper. I signed it. Father asked me to sign it. My name is C. L. Pope. I had hand on the pen; I signed it. Nobody held my hand. When I signed it I was standing at Martin's back; he was sitting at a chair at a table. He had the pen. I held the pen at the end; in this way my name was put to the will. I asked him to hold the pen. My daddy was sitting there; Mr. Fulbright was there; father was 84 years old at the time. He seemed like he always did. He died about ten months after that, I think, am not certain. He complained of heartburn; went off to the bottoms and died there; died suddenly; don't know what was the matter with him. His mind was good as usual."

It was also in evidence that Candace Pope could write. After the witnesses to the paper writing had testified, the propounder offered the same as the will of Elijah Pope. The caveators objected for that the subscribing witness, C. L. Pope, stated that she could write but did not herself subscribe her name, but authorized the other witness, Miller, to write her name, and she held the end of the pen while he wrote her name, and that therefore she did not subscribe her

name agreeably to the requirements of the statute. The objection was sustained. The propounder excepted and, from judgment against him, appealed.

L. C. Caldwell and *Z. V. Long* for the propounder.
J. B. Connelly and *R. B. McLaughlin* for the caveators.

HOKE, J. The point which the parties desired and intended to present and which the record does present, is thus stated in the case on appeal: "The only question is as to the attestation of the will by one of the subscribing witnesses, C. L. Pope, her name appearing thereon in the normal handwriting of the other subscribing witness, M. L. Miller, and nothing appearing on the face of the paper to show that Miller had authority to sign her name, or that the subscription is not in her handwriting, except from the evidence which is set forth in the case."

On that question the court is of opinion that there was error in the ruling of the judge below; and on the testimony presented, if believed by the jury, the paper writing was properly proven as the last will and testament of Elijah Pope.

In construing the statute as to written wills, with witnesses, it is accepted law that the witness must subscribe his name to the paper writing *animo testandi*, in the presence of the testator, and after the testator has himself signed the same. *Ragland v. Huntingdon*, 23 N. C. (1st Ired.), 563; *In re Cox's Will*, 46 N. C., 321; *Chase v. Kittredge*, 93 Mass., 49. And it has been long established that the witness may properly subscribe by making his mark. *Pridgen v. Pridgen*, 35 N. C., 259; *Devereux v. McMahon*, 108 N. C., 134.

Some of the courts have also decided that the witness may subscribe by causing a third person to write the name of the witness in his presence, and that of the testator, and without such witness taking any physical part in the act. *Jesse v. Parker*, 6 Gratton, 57; *Smythe v. Irick*, 46 S. C., 299. And

the courts of New Hampshire, Kentucky, Kansas and some recent decisions in New York are to the same effect. There is strong authority to the contrary. *Riley v. Riley,* 36 Ala., 496; *Simmons v. Leonard,* 91 Tenn., 183; *McFarland v. Bush,* 94 Tenn., 538; *Hester v. Johnson,* 18 Ga. Our own court does not seem to have passed on this question directly, and it is not necessary to do so in the case before us; for the evidence is to the effect that Candace Pope held the pen during the entire time her name was being written. The witness took part in the physical act of writing her name, *animo testandi,* in the presence of the testator, at his request, and thus fulfils every requirement for an effectual subscribing witness to a will. Such requirement is stated by an approved writer as follows: "A person, to become a subscribing witness to a will, must sign his name or make his mark, or do some physical act, affixing or recognizing his name, which he intended as a subscription." Martindale on Conveyancing (2nd Ed.), p. 554. And in Underhill on Wills, vol. 1, p. 274, it is said that not only a mark with the name of the witness attached, but anything that the witness shall write with intent that it shall stand for his name, shall be a valid signing by him. It has also been held that if the witness puts his name to the paper, *animo testandi,* he may subscribe by affixing his initials, and his hand may be even guided by another.

If the witness can effectually subscribe in the many modes suggested, it would seem that he could do so when he holds the pen while his entire name and full signature is written. The only reason suggested against the validity of this attestation is the fact that the witness was able to write herself, and it is contended that this kind of signature is only sanctioned when the witness is unable to write, or at most, when temporarily disabled. But the authorities do not support this position. As a matter of fact, in most cases where the witness has been permitted to subscribe in this way, he was

unable to write, but this fact was not regarded as essential and should not be controlling. One principal purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution. Taking part in some physical act in the presence of the testator by which the name of the witness is affixed to the instrument *animo testandi* is the essential feature of the requirement. *In re Cox Will, supra.* It is always desirable that a witness who can write his name should be selected and that he should write the signature in his own hand; but this is a matter of convenience in the probate of the paper, more particularly in case of the death of the witness, and does not bear with special force on the act of execution—the *res gestae.* Thus in *Harrison v. Elvin,* 43 Eng. Com. Law, 658, where it was urged upon the court that only a witness who could write should be allowed as a subscribing witness, because otherwise the signature could not be proved after his death, Lord Denman rejected the suggestion as controlling, saying that this was only an inconvenience and likely to arise in any kind of an attestation. It is not of the first importance, therefore, whether the witness could or could not write, and the authorities are to the effect that to become an effectual subscribing witness by making a mark, or in the other ways suggested, it is not necessary to show as a prerequisite that the witness was unable to write. In Martindale on Conveyancing, section 190, it is said: "It may be observed that it is not necessary that a party should sign his name; but his mark is sufficient, though he should be able to write." In 3 Washburn on Real Property, 286, we find it stated as follows: "Affixing his mark by the grantor against his name, though written by another, is a signing, though it do not appear that he cannot read or write." These authorities are cited with

approval in *Devereux v. McMahon, supra,* 142, 144. In 1 Williams on Executors, 134, it is said that the decisions on the construction of the Statute of Frauds appear to make it clear that in case of the witness as well as the testator, the subscription by mark is sufficient, notwithstanding the witness is able to write. In *Jesse v. Parker, supra,* it is not stated that the witness could not write, and in *Smythe v. Irick, supra,* it expressly appears that the witness could write, and it was held that this fact did not affect the principle.

It will be noted that these two last cases are from courts which maintain the position that a subscription can be made without any physical or manual act by the witness at all; but they are apt as authorities on the position now being maintained. The point is expressly decided against the position of the caveators in *Baker v. Denning,* 43 E. C. L., 335—80 Adol. & Ellis, 74. The witness, Candace Pope, having taken part in the physical act of writing her name as witness, and this having been done *animo testandi* at the request of the testator and in his presence, the court is of opinion that she is an effectual subscribing witness to the will, and that this result is not affected by the fact that such witness was at the time able to write her own name.

There was error in the ruling of the court, and a new trial is awarded.

New Trial.

CLARK v. STATESVILLE.

(Filed November 15, 1905).

Constitution—Permanent Roll—Qualified Voters—Registration.

1. The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever required by the statutes regulating the registration of voters.

2. The making of a permanent roll or record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear thereon are not required to have the educational qualification.

3. When the law required that a majority of the qualified voters should have cast their votes for a given proposition before it becomes a law, it means a majority of the registered voters, (qualification by payment of taxes not being involved in this case).

ACTION by R. R. Clark against the City of Statesville, pending in the Superior Court of IREDELL County, heard by *Judge B. F. Long,* at Chambers at Statesville, on the 7th day of October, 1905.

This action was brought to determine the validity of an election held in Statesville on the 15th day of August, 1905, under the provisions of chapter 375 of the Private Laws of 1905, at which election the question of issuing thirty thousand dollars of bonds for graded school, water, sewerage and electric light purposes was submitted to the qualified voters of said city. The only question in the case is, as will hereafter appear, whether a majority of the qualified voters of the city voted for the issue of the bonds. The proper authorities ordered a new registration for the said election under and by virtue of chapter 750, section 3, of the Acts of 1901.

At the time of the election, there were registered on the permanent roll of registered voters, in the office of the clerk of

the Superior Court, the names of more than 250 persons residing in Statesville, who were twenty-one years old and possessed the qualifications mentioned in Article 6, section 1 of the Constitution. These 250 voters were also registered on the old registration books of Statesville at the time the mayor and aldermen ordered a new registration, having registered their names on the said books during the month of March, 1903, but they did not register their names anew on the books of the new registration ordered by the city authorities.

The permanent roll of registered voters, kept in the clerk's office, shows the names, alphabetically arranged, of voters residing in each of the four precincts into which Statesville township is divided, but does not show which of the voters live inside the city of Statesville and which live outside. There is no permanent roll of registered voters kept by the authorities of Statesville. The only permanent roll is the one kept by the clerk of the court as above stated. Statesville township covers a larger territory than the city of Statesville, and a number of voters on the permanent roll live outside of the city limits. But the 250 voters above mentioned all live within the city.

There were 329 voters registered on the new registration books, and, of these, 223 voted for graded school bonds and 224 voted for water, sewerage and electric light bonds.

The plaintiff contends that the names of the 250 voters registered on the permanent roll, who were also on the old registration books of the city, but who failed to register their names on the books of the new registration ordered by the city, ought to be added to the 329 names on the new registration books in order to ascertain the number of qualified voters at the election. If this is done, the total number of qualified voters was 329 plus 250, making 579, and neither of the class of bonds voted for received a majority of the qualified votes.

There is no question that the act authorizing the bonds to

be submitted to a vote of the people was passed in accordance with the constitutional requirements, or that the election was regularly called, or that due notice was given of the election and also of the new registration; nor is there any objection made to the election or to the issuing of the bonds, except that herein specified.

As stated by the plaintiff's counsel in his brief, the only question involved in this appeal is this: Were the 250 persons, whose names were registered on the permanent roll and also on the old registration books of the city but not on the books of the new registration ordered by the city, qualified voters at the election?

After the election was held and the finding and determination of the duly authorized canvassers that a majority of the qualified voters had cast their votes in favor of issuing bonds, and when the authorities of the city, who were charged with the duty of issuing the bonds, had declared their purpose to do so, the plaintiff, a tax payer of the city, brought this action in behalf of himself and all other tax payers to declare the election void and to enjoin the issue of the bonds. The matter came on to be heard before *Judge Long* on the complaint and answer, the foregoing facts taken therefrom having been admitted, and it was adjudged upon due consideration that the election was valid and that the bonds, when issued, will be valid obligations of the city. The temporary restraining order theretofore issued was accordingly dissolved and the prayer for an injunction denied, with costs. The plaintiff excepted and appealed.

J. B. Armfield for the plaintiff.

Armfield & Turner and *Geo. B. Nicholson* for the defendant.

WALKER, J., after stating the case: The decision of this case must turn upon the construction of article 6 of the Con-

stitution and especially of section 4 thereof, it being the one which prescribes a certain educational qualification for a voter and the payment of his poll tax before he shall be entitled to vote, and provides for the registration of all who are entitled to vote without having successfully undergone the educational test therein required and for the making of a permanent record of such registration. It is now contended by the learned counsel for the plaintiff in this case, that this registration of voters, who have not submitted to the educational test, was intended to be permanent, in the sense that the voter can register once for all time and for all elections, the permanent record required to be made answering as a registration, not only for the next, but for all subsequent elections, such a voter not being required ever to register anew. We are unable to take this view, though it has been ably argued by counsel and presented to us with great plausibility. A consideration of article 6 of the Constitution, and of the system of conducting elections in this State established under its provisions, leads us, without any hesitation, to the conclusion that such a construction would defeat the main purpose of our election laws, constitutional and statutory, and produce grave and serious results in their operation. The meaning of this section of the Constitution is to our minds unmistakable and we think the framers of it have selected words most apt and adequate to express that meaning. After prescribing in sections 1 and 2 certain qualifications for a voter, it is provided in section 3 that "every person offering to vote shall be, at the time, a legally registered voter as herein prescribed, and in the manner hereafter provided by law and the General Assembly shall enact general registration laws to carry into effect the provisions of this article." In section 4 we find that every person presenting himself for registration shall be able to read and write any section of the Constitution in our language, and before he shall be entitled to vote, he must show that he has paid his poll tax for the previous year

on or before the first day of May of the year in which he proposes to vote, but no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any one of the United States, wherein he then resided, and no lineal descendant of any such person shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications therein prescribed. Provision is then made, in the same section, for a registration of all voters of the latter class and the making of a permanent roll or record of their names. This was intended to be done, most clearly, for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear on the list thus made are not required to have the educational qualification. The educational test did not apply to any persons who themselves were, or whose ancestors were, voters on January 1, 1867, and to ascertain and record who such persons were, the roll was required to be made. The registration and permanent roll were intended to be a substitute for the educational test or qualification, nothing more and nothing less. This appears from the language that no person thus registered "shall be denied the right to register and vote at any election in this State, by reason of his failure to possess the educational qualifications herein prescribed." In all other respects, the two classes of voters, those who are educationally qualified and those otherwise qualified under said section, are to remain on the same footing and to be subject alike to the same laws regulating the exercise of the elective franchise. The context plainly shows that this was the intention and should be the construction of the section, and good and valid reasons can be urged in its support and in favor of the policy adopted. It cannot be doubted, that it was the purpose to arrange the voters of this State into two classes, one with the educational qualification and the other without it, but with another qualification deemed to

be sufficient in the place of it. But when they are thus classified and brought to a position of equality of privilege in the exercise of the right to vote, why discriminate against the former class by requiring them to register at each successive election, if so provided by statute, in favor of the latter, by relieving them of this burden. Is it not more reasonable to suppose that the "registration and permanent record," were merely intended to preserve the evidence as to who had thus qualified themselves under the second of the provisions of that section? But the construction may well be sustained by either of two other reasons. There is a condition annexed in section 4 to the right of persons thus registered on the permanent roll to vote "in all elections by the people of this State" namely, "unless disqualified under section 2 of this article, and provided that such person shall have paid his poll tax as above required." Now section 2 requires, as a qualification for voting, a residence in the State for two years, in the county six months, and in the precinct or ward, or other election district four months next preceding the election, with a proviso that removal from one voting precinct to another shall, after four months from the time of such removal, deprive the voter of the right to vote in his former precinct, and he cannot vote of course without registration in his new precinct, and it also provides that conviction of a felony punishable by imprisonment in the penitentiary shall disqualify him as a voter until restored to citizenship in the manner prescribed by law. It is evident from this reference in section 4 to section 2, that it was not intended to do more for the one class than for the other. They must all comply with the general provisions of the election laws, enacted for the purpose of securing regularity and certainty in the methods of holding elections, and of protecting the ballot box against fraudulent voting. There is no reason why this class of voters (those who are to be on the permanent roll) should be exempt from the operation of those laws, which do

not equally apply to the other class. The object of the lawmakers can be well and fully accomplished without such discrimination as between different classes of voters. But we think the very words of section 4 exclude any other conclusion as to the meaning of the organic law upon this subject. The language is that no such person who could vote, or whose ancestor could vote on January 1, 1867, "shall be denied the right to register and vote at any election in this State by reason of his failure to possess the prescribed educational qualifications, provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908." He shall not be denied—not the right to vote—we observe, but the right "to register and vote," provided he complies with the section by registering on the permanent roll or record. Transposing terms, the result will clearly be this, that if he registers for the permanent roll, he shall not be denied "the right to register and vote" in any future election by reason of his failure to possess the educational qualification. This is too plain, we think, to admit of the likelihood of any misapprehension as to the true meaning. He must register before he can vote.

The construction which we have settled upon is the one which has received the full sanction and approval of the Legislature, as is evidenced by the language of section 9 of chapter 550 of the Acts of 1901, being the act providing for permanent registration of all persons entitled to vote under section 4 of article 6 of the Constitution, and that section of chapter 550 of the Act of 1901 is especially a legislative interpretation of the meaning of section 4 of article 6 of the Constitution in this respect, that the requirement of registration for the "permanent record," in lieu of the test of reading and writing any section of the Constitution is only a superadded qualification and does not dispense with any of the qualifications of a voter ordinarily required. This can readily be inferred from the language of said section, which

is as follows: "Any person holding a certificate of registration as herein provided for, shall be entitled to register in any county of this State, notwithstanding his inability to read and write, provided that he shall be otherwise qualified as an elector."

We have not adverted specially, in this connection, to section 3 of article 6 of the Constitution, by which it is required that every person offering to vote shall be at the time legally registered, as prescribed in that instrument and in the manner thereafter provided by law, and by which it is further directed that the Legislature shall enact "general" registration laws, as distinguished from any special registration laws, to carry into effect the provisions of that article. This manifests clearly the intent, that while the person duly registered on the "permanent record" should have the general right forever thereafter to vote in all elections, it being the same right precisely he would have had if the amendment had not been adopted, yet he shall enjoy and exercise this right subject to the other provisions of law concerning elections and to the same extent as they affect other voters who can read and write. The mere fact that he or his ancestor had voted in 1867 was surely not intended to lift him to a higher plane of citizenship or to accord to him greater privileges or immunities as a voter than the educated man—some were freed from the disability of illiteracy and others permitted to vote if they or their ancestor had voted in 1867, that is all. They were not, therefore, exempt from the full operation of all other laws intended to safeguard the ballot box and there is no sound reason why they should be. Any other provision might well have been challenged and opposed by the people, as unwise and inexpedient. This construction preserves and secures unimpaired to the voter on the permanent record the very right which it was the purpose that he should enjoy under the Constitution and to its fullest extent. Anything more than that would be an unfair discrimination against

other voters and we should not for a moment suppose the people intended that any such result should follow the adoption of the amendment.

We take it to be now thoroughly settled that, contrary to some earlier adjudications, registration is necessary to qualification as a voter, so that when the law required that a majority of the qualified voters should have cast their votes for a given proposition before it becomes the law, it means a majority of the registered voters. *Norment v. Charlotte,* 85 N. C., 387; *Southerland v. Goldsboro,* 96 N. C., 49; *Duke v. Brown, Ibid.,* 127; *McDowell v. Construction Co., Ibid.,* 514; *Wood v. Oxford,* 97 N. C., 227. These cases reversed the former rulings on the subject in *Railroad v. Commissioners,* 72 N. C., 486, and *Reiger v. Commissioners,* 70 N. C., 319. The canvassers proceeded upon the correct principle in ascertaining that a majority of the qualified voters of Statesville cast their ballots in favor of issuing the bonds. This results from our construction of the Constitution, when considered in connection with the cases just cited which define who is a "qualified voter" within the meaning of those words as used in chapter 375 of the Act of 1905, under which this election was held, and in other similar acts.

His Honor, *Judge Long,* to whom the matter was submitted for decision, was of opinion, and so adjudged, that, as far as appeared, the election was in all respects properly conducted and the result correctly declared and that the bonds will not be invalid for any reason now assigned by the plaintiff. In this opinion and judgment we concur.

Affirmed.

CARTER v. RAILROAD.

(Filed November 15, 1905).

Railroads — Death by Wrongful Act — Damages — Earnings —Personal Expenses —Instructions —Questions for Jury.

1. In an action for damages for death by wrongful act, an instruction that "whenever an adult has been killed and his administrator brings suit * * * it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that, it is the duty of the jury to say that he is not entitled to recover anything," is erroneous.

2. Under sections 1498-9 of The Code, the question is, did the relatives suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased.

3. In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of life, business calling or profession, etc., and the amount spent for his family, or those dependent upon him, should not be deducted.

4. The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury.

PETITION by the plaintiff to rehear this case, which was decided at the Spring Term, 1905 (138 N. C., 750), no written opinion being filed.

R. C. Strudwick and *J. A. Barringer* for the petitioners.
King & Kimball in opposition.

Per Curiam. This is a petition to rehear this cause disposed of at the last term, 158 N. C., 730. His Honor said to the jury among other things: "The court charges you as a matter of law, and it is so plain that there can be no mistake about it, that in this case, whenever an adult has been killed, no matter whether he was killed by an individual or a corporation, it is all the same, and his administrator brings suit, it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that, it is the duty of the jury to say that he is not entitled to recover anything." To this instruction the plaintiff excepted.

There was error in two respects. The instruction whether so intended or not, confined the jury to the consideration of testimony in regard to the net earnings of the deceased at the time of his death or prior thereto, or, in other words, whether he had accumulated anything at the time of his death. By a proper construction of the statute, Code, secs. 1498 and 1499, the inquiry whether or not the relatives of the deceased have suffered any pecuniary loss by his death, is not limited to the date of his death. It must necessarily extend beyond that period. The true question is, did the relatives really suffer any loss by reason of the fact that the deceased failed to live out his expectancy. In determining it, the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased, and from the result of such consideration, estimate as near as may be, and ascertain according to the rule laid down by the court what pecuniary advantage would have accrued to his relatives if he had lived out his expectancy, as the jury may find it to be, using the mortuary tables prescribed to aid them. This question is within the peculiar province of the jury. The court may not take it from them and decide it as a question of law. He instructs the jury in regard to the rule for ascertaining the net income during the entire life of the de-

ceased, and how to ascertain the present worth of the amount fixed by the jury as the total accumulation during his life, and their verdict in the light of all the evidence must be fixed by them. This court said in *Benton v. Railroad,* 122 N. C., 1009, after stating the rule as laid down in *Pickett's case,* 117 N. C., 638: "In applying this rule * * * and to enable the jury to properly estimate the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they should consider his age, habits, industry, means, business qualifications, skill and reasonable expectation of life." *Watson v. Railroad,* 133 N. C., 190. This court held in *Russell v. Steamboat Co.,* 126 N. C., 961, and *Davis v. Railroad,* 136 N. C., 116, that substantial damage, ascertained in the manner pointed out, could be recovered for the wrongful killing of an infant. To confine the jury to the net income prior to and at the time of the death, would exclude any recovery in such cases. The same result would follow in the case of a young man just entering upon active life as well as many others, which readily occur to the mind.

The charge was also erroneous in that it directed the jury to deduct from such gross income or earnings, as they might find the deceased would have made, his "expenditures." The true rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of living, business calling or profession, etc. If by "expenditures" is understood, and we think the jury in the absence of any explanation may have well so understood it, the amount spent for his family or those dependent upon him, the result would be to deprive the families of a very large majority of men from recovering damage for their death. But a small number of men accumulate estates. Their income or earnings, after paying their actual personal expenses, are expended in the support and education of their children. Certainly it was not contemplated that for wrongfully causing the death of such a man, no damage could

be recovered, although his death deprived his family of their sole support, while for the death of one without any family, or who by miserly living and hoarding deprives his family of support and education, large damages should be awarded. It cannot, with any show of truth, be said that in the first case the family sustain no pecuniary loss by reason of the death of the husband and father. Such a construction of the statute would place beyond the protection of law nine-tenths of the people. His Honor, of course, did not intend to so construe the law, but it is the logical result, if the absence of accumulation by the deceased or the lack of an excess of earnings over all expenditures, is to be laid down as the rule of law. It is not for the court to instruct the jury in any case, when death by the wrongful act, neglect or default of the defendant is shown or admitted, that upon any state of facts it is their duty to render a verdict against the plaintiff. "The reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury, subject of course to the supervisory power of the court to prevent injustice by setting aside the verdict, if excessive.

The petition must be allowed and a new trial awarded.

Petition allowed.

CAMPBELL v. EVERHART.

(Filed November 15, 1905).

Deed to Heirs of Living Person—Unborn Children—Ejectment—Title, How Shown—Adverse Possession—Estoppel—Instructions—Opinion on Facts by Judge—Sufficiency of Evidence—Parental Relations—Evidence—Census Lists—Transactions with Deceased.

1. By virtue of section 1329 of The Code, a deed conveying land directly to the "heirs" of a living person, passes whatever title the grantor had to the children of such person.

2. By virtue of section 1328 of The Code, a child if *en ventre sa mere* at the time the deed was executed took as tenant in common with the living children.

3. A plaintiff in order to recover in an action of ejectment, must show a title good against the world or good against the defendant by estoppel.

4. In an action of ejectment plaintiff makes out a title *prima facie* good against the world when he shows a grant from the State and *mesne* conveyance connecting him with the grant, or by proving title out of the State by grant duly issued or by an adverse possession for 30 years without regard to the number or connection of the tenants, and 20 years' adverse possession in himself, or those under whom he claims or such a possession of 7 years, under color, or by showing 30 years' adverse possession by himself, or by some one person and *mesne* conveyances connecting him with the title thus acquired by that person as against the State, or by showing adverse possession by himself, or those under whom he claims for 21 years, under color.

5. In an action of ejectment, plaintiff makes out a title *prima facie* good against the defendant by showing an estopel arising out of the fact that the defendant obtained possession of the land as tenant of the plaintiff, or by his permission, or by connecting the defendant with the common source of title, showing in himself an older or better title from that source.

6. Where a party takes possession of land under another, he is not allowed to dispute the latter's title until he has given up the possession so acquired, and the rule applies with equal force to a person who continues a possession antecedently held by him with the consent of the party whose title is in question.

7. When possession is wholly restored to the party who gave it, the estoppel no longer applies, and the party formerly affected by it can stand upon his original right and set up any right or title he may have to the property surrendered.

8. It was error to instruct the jury that the deed was sufficient of itself to vest the title in the grantees therein, where plaintiffs' right to recover was dependent upon evidence that the defendants' grantor was estopped to claim the land, and there was no evidence of title in the grantor of plaintiffs' ancestors, as the credibility of the witnesses was a matter for the jury to pass upon, and the court in deciding this question, invaded their province, contrary to the provision of section 413 of The Code.

9. Evidence should raise more than a mere conjecture as to the existence of the fact to be proved.

10. When this court says that there is no evidence to go to the jury, it is not meant that there is literally and absolutely none, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established.

11. It is a general rule that, as between those occupying parental and filial, or *quasi* parental and filial relations, the possession of one is presumed to be permissive and not adverse to the other.

12. The recital in the deed of plaintiffs' grantor that H. (the character of whose possession was at issue) paid her the consideration is not competent against the defendants, nothing else appearing.

13. A census list (found in the clerk's office) was not competent evidence to show that one of the grantees was not *in esse* at the date of the deed—census reports being competent only to prove facts of a public nature.

14. Testimony of a witness interested in the event of the action, as to transactions or communications between him and a deceased person from whom the defendants derive title, is not competent against them, the extent of the interest not being material.

CAMPBELL *v.* EVERHART.

ACTION by R. G. Campbell and others against Chas. Everhart and others, heard by *Judge Henry R. Bryan* and a jury, at the April Term, 1905, of the Superior Court of DAVIDSON County.

This is an action for the recovery of real property, a parcel of land in Lexington township. Plaintiffs, in support of their claim to title, put in evidence a deed dated November 22, 1870, from Susan Humphreys "to the lawful heirs of B. F. Hilliard and their heirs." Hilliard was the son of Susan Humphreys and the plaintiffs are the grandchildren of said Hilliard and claim under the deed for the reason that their mothers (who are now dead) were the children of Hilliard and therefore answer to the description in the deed of the persons who were intended to take thereunder. There was no proof of title in Susan Humphreys, but there was testimony which plaintiff insists tended to show that Hilliard either entered upon the land originally or continued in possession after the date of the deed to his heirs (22nd Nov., 1870), by her permission, and is, therefore, estopped to deny her title. It is unnecessary to set out this testimony in order to an understanding of the point upon which the case is decided. There was testimony to the effect that Hilliard had occupied the land for twelve years prior to the date of the deed of Mrs. Humphreys in 1870, and that he continued in possession until his death in 1898, with brief interruptions, his children living there with him most of the time during their minority and after they became of age, and that he had conveyed a part of the land to his wife and other portions to Darr and Leonard.

The court charged the jury, among other things not necessary to be stated, as follows: "(1) The burden of the issue is upon the plaintiffs. They must recover upon the strength of their own title and not the weakness of the defendants. They must show title in themselves, and that they were entitled to the possession at the commencement of the action.

(2) The court instructs the jury that the deed introduced by the plaintiffs in this action is sufficient to vest in them the legal title to the land described in the complaint and to authorize them to take possession of the same, nothing else appearing." Defendants excepted.

And in response to prayers from the plaintiffs, the jury were instructed as follows: "(1) There is no evidence of exclusive, continuous and adverse possession under color of title on the part of the defendants for seven years, and unless you find from the evidence that the defendants have had adverse and exclusive possession for the period of twenty years under known and visible metes and bounds, you will answer the first issue 'Yes.' Defendants excepted. (2) The court charges you that there is no evidence that the defendants have had adverse and exclusive possession under known and visible metes and bounds for the period of twenty years, and you should answer the first issue 'Yes.' Defendants excepted. (3) The court charges you that the deed of 1870 from Susan Humphreys to the lawful heirs of B. F. Hilliard was the same in law as if it had been made to the children of B. F. Hilliard, and conveyed a valid title from Susan Humphreys to the children of B. F. Hilliard then living, and if you find from the evidence that Margaret Lenora Wood was born in April thereafter, she would in law be included as one of the children then living, and would be within the description of the grantees in the deed. Defendants excepted."

The court refused the following prayers of the defendants: "(1) The court charges you that the deed from Susan Humphreys to the lawful heirs of B. F. Hilliard is invalid and null and void for want of grantees, and the jury should answer the first issue 'No.' (2) That there is no evidence to go to the jury that Susan Humphreys, at the time of the execution of the deed, owned said land or was in possession thereof or had any right to convey the same, and the jury should answer the first issue 'No.' (3) That if the jury shall

find from the evidence that prior to the execution of the deed from Susan Humphreys to the lawful heirs of B. F. Hilliard, said B. F. Hilliard was in the open, notorious and adverse and exclusive possession of the land in controversy and continued to so hold the same up to his death, and that after his death, his widow, V. A. Hilliard, held the same under him by deed from B. F. Hilliard introduced in evidence, and her grantees so continued to hold adverse possession thereof up to the commencement of this action, then the plaintiffs would not be entitled to recover and the jury should answer the first issue 'No.' (4) That in passing upon the question of adverse possession, the jury should consider the fact, if they find such to be the fact, that B. F. Hilliard, from a time prior to the year 1870 and up to his death, was in receipt of the rents and profits of said land, paid taxes thereon, lived on the same for a large part of the time, conveyed a large portion of the tract by deed to his wife, and other portions thereof by deed to Darr and Leonard, witnesses for defendants, and that Jane Campbell and Lenora Wood, plaintiffs' ancestors, never made any claim to said land, if the jury find they made no claim thereto, and if upon the whole evidence the jury shall find that defendants and those under they claim have held continuous, adverse exclusive possession thereof for the years succeeding the year 1870, then the jury shall answer the first issue 'No.' (5) The fact that Jane Campbell and Lenora Wood, ancestors of the plaintiffs, lived with their father a part of the time on the land in controversy as members of the family, as children live with their parents, would not put them in possession of the land under their own right, nor interrupt their father's adverse possession, if the jury shall find his possession was adverse, until they made some claim to own the same, and if the jury shall find from the evidence that the children so lived with their father as members of his household, and not under any claim or right of their own, and if the jury shall further find that defendants and those under

whom they claim have been in the continuous, exclusive, adverse possession thereof from the year 1870 and prior thereto, then the plaintiffs are not entitled to recover and the jury shall answer the first issue 'No.' (6) That Fred Hilliard, a son of B. F. Hilliard, born in lawful wedlock, though begotten after the execution of the deed from Susan Humphreys to the lawful heirs of B. F. Hilliard, would share in said land, and under the same there are four children to take the same, viz.: Sallie Hilliard, Jane Campbell, Lenora Wood and Fred Hilliard, or the heirs of such of them who are dead, and in no event can plaintiffs claim more than one-half of the land and the jury should answer the issue accordingly."

There was a verdict and judgment for the plaintiffs and defendants, having duly excepted to the rulings of the court, appealed.

Watson, Buxton & Watson, Walser & Walser and *King & Kimball* for the plaintiffs.

McCrary & Ruark and *E. E. Raper* for the defendants.

WALKER, J., after stating the case. The first question raised in this case calls for a construction of the deed from Mrs. Humphreys to the heirs of her son, B. F. Hilliard, and also involves its validity. We have no doubt as to either proposition thus presented. At common law, a conveyance could not be made directly to the heirs of a living person, simply because a living person could have no heirs *in presenti*. The rule of the law then was, *Nemo est haeres viventis*. This maxim was originally and generally applied to both wills and deeds and its proper translation was that, "No one can be heir during the life of his ancestor." And though a party may be heir apparent or heir presumptive, yet he is not heir, living the ancestor, and therefore, when an estate was limited to one as a purchaser under the denomination of heir, heir of the body, heir male or the like, the party could not take as pur-

chaser unless, by the death of the ancestor, he has, at the time when the estate is to vest, become the very heir. But this rule was relaxed by the courts and an exception engrafted on it, and, if there was sufficient on the face of a will to show that, by the word "heir," the testator meant heir apparent, it should be so construed; and in such case the popular sense was allowed to prevail against the technical. In other words, it appears to have been established by the authorities that, *prima facie,* the word "heir" should be taken in its strict legal sense, but, if there was a plain demonstration in the will that the testator used it in a different sense, the court would assign that meaning to it, what was sufficient to show that the testator did not intend that it should have its technical construction, depending largely upon the language employed in connection with it and the circumstances under which the word was used. Broom's Legal Maxims (8th Ed.), 521, marginal page, 523. It was likewise held in the case of a will that the rule had no place, if the testator knew of the existence of the parent and intended his devise to take effect during his life. Broom, 524. One reason for the relaxation of the rule in the case of wills was, that the testator might be *inops consilii* and the instrument therefore was construed so as to effectuate his intention. But the maxim was also extended to deeds, and a limitation (the word is here used in the sense of conveyance) "to the heirs of a person," who is living, was held to be void for uncertainty, as no one can in any proper sense be the heir of a living person and it could not therefore be known who were to have the benefit of the conveyance, but it was likewise the rule in regard to a deed that, if anything appeared on its face to indicate that the grantor used the word "heirs" as *designatio personarum,* or if a preceding estate was created so as to make the limitation to the heirs of the living person a contingent remainder depending for its vesting upon the event of the death of the ancestor before the life estate terminated, the word "heirs"

was construed to mean children. It has always been true, both in the case of deeds and of wills, that if the instrument shows who the grantee is or if it designates and so describes him that there is no uncertainty respecting the party who is intended to take under the will or deed, it is not of vital consequence that the matter which establishes his identity is not in the common or best form or expressed with technical nicety or accuracy or in the usual or most appropriate position in the instrument. Devlin on Deeds, sections 184 and 185; 2 *Ibid.*, sec. 364 and note 11, where cases from this and other States are collected. 3 Washburn on Real Property, 282. But at common law where the limitation in the deed was simply to the heirs of a living person and nothing else appeared to indicate the special intention of the grantor as to who should take, the deed was void because no grantor was sufficiently designated. Our statute completely reverses this principle, and now, by virtue of its wise provision, such a limitation is conclusively presumed to be intended for the children of the person named therein. The language of the statute is too plain for any possible doubt as to its true meaning. It is as follows: "Any limitation by deed, will or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless the contrary intention appear by the deed or will." Code, sec. 1329. But the defendants' counsel contends that the use of the word "limitation" in the statute takes our case out of its operation, as the deed in this case is, in effect, a direct conveyance to the heirs of B. F. Hilliard without the creation of any preceding estate to be "limited" or determined by the happening of a future event or the performance of any condition. The fallacy of this contention is to be found in the misapprehension of the true legal definition of the word limitation. It has a twofold meaning, says Mr. Fearne. We quote his own language: "Great confusion has frequently arisen from not observing that the word limitation is used in two different

senses: the one of which may, for the sake of convenience of distinction, be termed the original sense; namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate; and the other, the derivative sense; namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate." 2 Fearne on Remainders (4th Am. Ed.), sec. 24, marg. page 10. In our statute, the word is manifestly used in its derivative or secondary sense, which is made very clear to us by the learned, able and elaborate opinion of *Chief Justice Shepherd* in the leading case of *Starnes v. Hill,* 112 N. C., 1, remarkable for its lucidity of statement and the strength and cogency of reasoning from ancient and well settled principles of the law by which it distinguished between vested and contingent remainders and further sustained the conclusion of the court, that this statute did not abolish the Rule in Shelley's case, but was intended merely to give effect to the intention of the maker of the instrument, namely, that the persons for whose use and benefit it was made should take either directly or indirectly as purchasers, and to cure what was supposed to be the defect in, and to remove the injustice of the rule of the common law. *Starnes v. Hill, supra.* Under this construction of our statute, Margaret Hilliard (afterwards Margaret Wood), if *en ventre sa mere* at the time the deed was executed, took as tenant in common with the living child or children, who at the time answered to the description of "lawful heirs" of their father. She would not have taken anything at common law, as she was not actually *in esse* at the date of the deed and no one was appointed to preserve the use to her. In *Dupree v. Dupree,* 45 N. C., 167, *et seq., Pearson, J.,* speaking of a conveyance immediately to an unborn child, says: "Property must at all times have an owner. One person cannot part with the ownership unless there be another person to take it from him. There must be a 'grantor and a grantee, and a thing granted.' We have no sort of

doubt that Mrs. Goff intended all the children of Robert and Rachael (Peggy Ann excepted), without reference to the time of their birth, to be participants of her bounty; and the only regret is that she did not call upon a lawyer, who would have drawn a conveyance passing the property to a trustee, by which the uses could have been kept open until the death of Mrs. Dupree, so as to let in all of her children. But she chose to make a common law conveyance directly to the children; and of course no other could take under her deed of gift except those *in esse*, or, as my *Lord Coke* expresses it, *in rerum natura*, when the right of property passed out of her, to-wit: at the date of the deed of gift. The owners were then called for and it was then necessary for them to take the property. The plaintiff could not answer the call, and there is no rule of the law by which we can give him another day." See also *Heath v. Heath*, 114 N. C., 547. This rule of the common law has been changed by the statute to the extent that it affected a child *en ventre sa mere*. It is now provided by statute that "an infant unborn, but *in esse*, shall be deemed a person capable of taking, by deed or other writing, any estate whatever in the same manner as if he were born," that is *in rerum natura*. Code, sec. 1328; *Heath v. Heath, supra.*

It comes to this, therefore, that the deed was sufficient in form and substance to pass whatever title Mrs. Humphreys had in the land to the children of B. F. Hilliard, her son. But we are brought now to the consideration of the question, did she have any title to pass? A plaintiff in order to recover in an action of ejectment, must show a title good against the world or good against the defendant by estoppel. He makes out a title *prima facie*, under the first branch of the requirement, when he shows a grant from the State (the origin and source of all title to land), and *mesne* conveyances connecting him with the grant, or by proving title out of the State, by grant duly issued or by an adverse possession for 30 years

without regard to the number or connection of the tenants, and 20 years' adverse possession in himself, or those under whom he claims or such a possession of seven years, under color, or by showing 30 years' adverse possession by himself, or by some one person and *mesne* conveyances connecting him with the title thus acquired by that person against the State (the law presuming not only title out of the State by virtue of the possession for 30 years, but also a grant to the person who has thus held the possession for 20 years of the time. *Bryan v. Spivey,* 109 N. C., 57); or by showing adverse possession by himself or those under whom he claims for 21 years under color; or by showing an estoppel arising out of the fact that the defendant obtained the possession of the land as tenant of the plaintiff or by his permission, or, lastly, by connecting the defendant with a common source of title showing in himself an older and better title from that source, the law, by a rule of evidence, established for convenience, not requiring in such a case proof of title beyond the common source. This rule is sometimes called an estoppel, whether erroneously or not we need not decide. *Alexander v. Gibbon,* 118 N. C., 796; *Newlin v. Osborne,* 47 N. C., 164; *Frey v. Ramsour,* 66 N. C., 466; *Caldwell v. Neely,* 81 N. C., 114; *Christenburg v. King,* 85 N. C., 229. The method of proving title to land is well stated by *Avery, J.,* in *Mobley v. Griffin,* 104 N. C., 112. In what we have said, no reference is made to the particular nature of the possession necessary to bar the entry of the State, or to the manner in which the connection between the successive tenants, when required, must be shown. This matter is fully discussed by *Justice Connor* in *Jennings v. White,* at this term.

If we apply the above stated principles to the facts of this case, we find that no evidence has been adduced to show any title in Mrs. Humphreys when she made her deed to the plaintiffs' ancestors, unless the testimony introduced tended to show that her son, B. F. Hilliard, either entered into pos-

session or continued his possession by her permission and thereby estopped himself, so long as he retained that possession, to deny her title. It is undoubtedly true that, where a party takes possession of land under another, he is not allowed to dispute the latter's title until he has given up the possession so acquired. The whole doctrine upon which the estoppel rests in such cases is most clearly and forcibly stated by *Dillard, J.,* in *Farmer v. Pickens,* 83 N. C., 549. "It is settled," says he, "that a person accepting a lease from another is estopped during the continuance of the lease, and afterwards, until he surrenders the possession to his landlord, to dispute his title, it being a rule founded on a principle of honesty which does not allow possession to be retained in violation of that faith on which it was obtained or continued. *Hartzog v. Hubbard,* 19 N. C., 241; *Lunsford v. Alexander,* 20 N. C., 166; *Smart v. Smith,* 13 N. C., 258; *Barnett v. Roberts,* 15 N. C., 81. The rule between lessor and lessee extends equally to one who takes or holds possession under a contract of purchase, and he is not permitted to controvert the title of him under whom he entered or by whose consent he has continued a possession. *Love v. Edmonston,* 23 N. C., 152." And the rule applies with equal force to a person who continues a possession antecedently held by him with the consent of the party whose title is in question. It is said in the same case, "The rule best supported by authority, English and American, as stated by Bigelow in his work on Estoppel, at pages 397 and 398, to be, that an anterior possession does not vary the application of the rule, on the ground that although the party asserting the estoppel may not have lost the advantage of parting with the possession, yet by attornment to him or the new relation of vendor and vendee, he may have been led into some omission or conduct prejudicial to his title which otherwise would not have been. In this State the rule is held to be, that a possession previous to a lease or contract of purchase does not let in the party to dispute the title which

he had recognized." *Springs v. Schenck,* 99 N. C., 551. The rule affects as well the assignee or undertenant of the person, who has thus acquired the possession of the land, as it does the assignor. *Lunsford v. Alexander,* 20 N. C., 40 (Reprint, 166); *Pate v. Turner,* 94 N. C., 47; *Bonds v. Smith,* 106 N. C., 553. But the estoppel lasts no longer than does the possession so acquired and on which it is founded. When possession is wholly restored to the party who gave it, the estoppel no longer applies, and the party formerly affected by it can then stand upon his original right, to which he is fully remitted, for reason being the soul of the law, when the reason of any particular law ceases, so does the law itself. Having given up that which he gained by reason of the favor or consent of another and which might prejudice the latter if he retained and asserted title in himself, he is at perfect liberty to set up any right or title he may have to the property surrendered, for he is not then bound in good conscience or in fairness to do otherwise. The plaintiffs, therefore, may show, if they can, that Hilliard entered upon the land or continued in the possession of it as the tenant of Mrs. Humphreys or in subordination to her, and the defendants may show, if they can, that he or those claiming under him, have surrendered the possession, so that now they may rely on any title that Hilliard had or that they have acquired in the premises. It follows, as a matter of course, that there was error in the charge in so far as the jury were told that the deed of Mrs. Humphreys to Hilliard's heirs at law (now construed to mean his children), was sufficient of itself to vest the title to the land in them. This was equivalent to a peremptory instruction, binding upon the jury, to find for the plaintiff, whereas the deed of itself could not pass a title the grantor did not have, and if the testimony was legally sufficient to show such a possession in Hilliard, under Mrs. Humphreys, as raised an estoppel against him, it consisted in the alleged declarations of Hilliard to Tussey and others and the credibil-

ity of these witnesses was surely a matter for the jury to pass upon. The court in deciding this question for them, invaded their province, contrary to the provision of The Code, section 413, which requires that in charging a petit jury in a case, the court shall not give an opinion whether a fact is fully or sufficiently proven, such matter falling within the true province of the jury, but shall only state the evidence and declare and explain the law arising thereon.

We have not passed upon the sufficiency of the testimony to show an estoppel, as the question may not be presented to us again and if it is the evidence may not be just as we find it in this record. It may be stronger or weaker than it now is. We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury. Applying the maxim, *de minimis non curat lex*, when we say that there is no evidence to go to the jury, we do not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established, though there is no practical or logical difference between no evidence and evidence without legal weight or probative force. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case and when reasonable minds, acting with-

in the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. *Lewis v. Steamship Co.*, 132 N. C., 904; *Byrd v. Express Co.*, at this term. To which may be added, *Wheeler v. Schroeder*, 4 R. I., 383; *Offutt v. Col. Exposition*, 175 Ill., 472; *Day v. Railroad*, 96 Me., 207; *Catlett v. Railway*, 57 Ark., 461; *Railroad v. Stebbing*, 62 Md., 504.

Whether any proof has been adduced in this case as to the estoppel, which conforms to the legal standard, we leave as an open question, to be decided when it becomes necessary to do so. Nor need we decide whether the fact that B. F. Hilliard's children lived on the land with him as members of his family, prevented his possession from being adverse to them, and those claiming under them, after the deed was executed by Mrs. Humphreys. It is a general rule that, as between those occupying parental and filial, or *quasi* parental and filial, relations, the possession of one is presumed to be permissive, and not adverse to the other. 1 Am. & Eng. Enc. (2nd Ed.), 821. The character of the possession will depend somewhat upon the state of the proof, as no hard and fast rule applicable to all cases can well be laid down. As illustrative of the general principle, we refer to the following cases: *Burrus v. Meadors*, 90 Ala., 140; *White v. White*, 52 Ark., 188; *Douglas v. Irvine*, 126 Pa. St., 643. If Hilliard held his possession under Mrs. Humphreys from November 20, 1870, the date of her deed, to the time of his death in 1898, he having never given up the land, such possession could not have been adverse to his children, who claimed under her deed, and it can make no difference, in this connection, nor indeed when considering the question of estoppel, whether she really had any title or not. If that time is excluded from the count altogether, his previous possession was not continued long enough to presume a title in him, he having no color. If he was not holding under his mother, then as no title is shown in her and consequently none in his children by virtue of her

deed, it becomes immaterial whether his possession was adverse to his children or not, for plaintiffs, in that event, having shown no title in themselves at all must necessarily fail in the suit, however weak the title of Hilliard, or the defendants may be, the burden of the issue being on them and not on the alienees of Hilliard, the defendants. It follows, therefore, that (1) the first instruction of the court in its general charge was correct and the second was erroneous; (2) the first instruction, in response to plaintiffs' prayers, was not correct, in the abstract, as if plaintiffs showed, *prima facie,* a title and right to recover and defendants were put to their proof, the latter were not confined to their own adverse possession, but could tack to it the possession of those under whom they claimed. But the error in this instruction was immaterial for the reason we have already given, that plaintiffs must fail if Hilliard was not in possession under Mrs. Humphreys, unless hereafter they can show title in her derived in some other way. (3) The second instruction in response to plaintiffs' prayers is likewise immaterial, for the reason just given in considering the next preceding instruction. If plaintiffs show a title in Mrs. Humphreys, otherwise than by estoppel, we do not think the possession of Hilliard could be considered adverse to his children, if they lived with him on the land, and during the time of such joint occupancy; (4) the instruction in response to plaintiffs' third prayer was correct, except as to the legal effect of the deed in passing title, which was at least misleading. The refusal of the first instruction, in response to defendants' prayers, was correct. Defendants' second prayer was correct in part. Whether there is any evidence of Mrs. Humphrey's possession will depend of course upon the nature of Hilliard's possession, as the jury may find it to have been. If he held under her, his possession was in law her possession. The sixth prayer was properly refused. The other prayers of both parties are sufficiently covered by what we have already said in this opinion.

There remains to be considered the questions as to the competency of evidence. (1) The recital in the deed of Mrs. Humphreys that Hilliard paid her the consideration, one thousand dollars, is not competent against defendants, nothing else appearing. It is merely her unsworn declaration. If he actually paid her the money, it would at least be some evidence as to the character of his possession, that is, as to whether he claimed in his own right or under her. (2) The census list (found in the clerk's office), offered by defendants to show that Lenora Wood was not *in esse* at the date of the deed from Mrs. Humphreys, was incompetent. Census reports are competent to prove facts of a public nature. As evidence they are confined to such facts and the details as to individual persons and other private matters, as the age of a particular person, or the product of a factory, are noted only as a necessary basis for the general summaries or the ultimate statement of facts affecting the public. 3 Wigmore on Ev., section 1671. The case of *Edwards v. Logan,* 114 Ky., 312, is directly in point. There, as here, a census list (not a census report) was found in the clerk's office, and offered to show non-age of one of the parties, whose vote had been challenged. It was held incompetent on two grounds (a) as not being a census report, and (b) as not evidence of any matter of a private nature. The method of proving age by documentary evidence is stated in Elliott on Ev., sections 410, 413 and 1286. It appears that such evidence as that offered in this case was admitted in *Flora v. Anderson,* 75 Fed. Rep., 231, upon the authority of Greenleaf Ev., 483, and Stephen's Dig. of Ev., art. 34, but on referring to these books we find that the authors state that public registers and reports are evidence only of facts of a public nature, and agree in this respect with Wigmore. The mistake in that case, we think, was in supposing that the fact proposed to be established was within that category. There was no proof as to how this list was made or from what source the informa-

tion it purported to contain was derived, and it would hardly accord with the general rule in regard to evidence, if it was permitted to be considered as against entries in the family Bible which were introduced. (3) Testimony of a witness interested in the event of the action, as to transactions or communications between him and a deceased person from whom defendants derive title, is not, of course, competent against them. The extent of the interest is not material.

It is unnecessary to specially consider the other numerous exceptions, as they may not again be presented.

We order a new trial for the error committed in the charge to the jury, as above indicated.

New Trial.

EUBANKS v. ALSPAUGH.

(Filed November 15, 1905).

Action for Breach of Contract of Employment—Burden of Proof—Justification—Harmless Error.

1. In an action for damages for a wrongful discharge, the burden is upon the plaintiff to prove the contract of employment, the discharge by the defendant and the existence and amount of substantial damages.

2. The contract of employment and the discharge by the defendant being established, the burden of proving justification is upon the defendant.

3. Where a mistake of the court is not on any essential or controlling feature of the case, it does not constitute reversible error.

ACTION by S. D. Eubanks against U. L. Alspaugh and another, heard before *Judge Henry R. Bryan* and a jury, at the May Term, 1905, of the Superior Court of IREDELL County.

EUBANKS *v.* ALSPAUGH.

The plaintiff alleged that the defendants, having employed him as superintendent of their mill for a term of six months, wrongfully discharged the plaintiff to his damage, etc. The defendants denied that plaintiff was wrongfully discharged, and alleged, by way of further defense, that the plaintiff was entirely incompetent to perform the duties he had undertaken, and claimed the right to discharge him on that account; and they further set up this breach of contract on the part of the plaintiff as a counterclaim to his demand. Issues were submitted responsive to the pleadings. Verdict and judgment in favor of plaintiff. Defendants excepted and appealed.

Furches, Coble & Nicholson and *Zeb V. Long* for the plaintiff.

Armfield & Turner and *R. Z. Linney* for the defendants.

Per Curiam: The judge below charged the jury very fully on the issues and properly put on the plaintiff the burden of proving the contract of employment, the discharge by the defendants, and the existence and amount of substantial damage.

The only exception made by the defendants, or urged upon our attention, was in giving the prayer for instructions by the plaintiff, No. 7, which is as follows: "The burden is upon the defendants to show that the plaintiff was not capable and efficient in the performance of his duties under the contract, and if the jury should find by a greater weight of the evidence that the plaintiff was not an expert in the departments of carding and spinning, yet if the jury further find by a greater weight of the evidence that the defendants had notice of this fact, at or before the time they employed the plaintiff, that the plaintiff was not an expert carder and spinner, if such was the fact, would not excuse the defendants for discharging the plaintiff, and if the jury find that the plaintiff

was discharged and for this cause, this would be a breach of the contract on the part of the defendants, and you will answer the third issue, 'yes.'" This was given.

The defendants excepted to the above instruction: First, because the burden was wrongfully put on the defendants. Second, because there was no evidence that the defendants knew of the plaintiff's incompetency before the contract of employment.

There is no merit in the first exception. The contract of employment and the discharge by the defendants being established, the law places the burden of justification on the defendants, and the charge of the court on this point is correct. *Deitrick v. Railroad,* 127 N. C., 25; *McKeithan v. Tel. Co.,* 136 N. C., 213.

While the second exception is not entirely responsive to the language of the charge, it sufficiently appears that the defendants intended to address the same to that part of prayer No. 7 on the question whether the defendants knew the plaintiff was not an expert carder and spinner before the contract of employment. The court here told the jury that even if the plaintiff was not an expert carder and spinner, yet if the jury further found that the defendants had notice of this before employing the plaintiff, such fact would not justify his discharge.

The defendants contend that there is no evidence that they had any notice in the matter, and there is none set out in the record, as far as the court can discover. There is testimony to the effect that the defendants only inquired of the plaintiff's capacity as a weaver, but no evidence of any notice as to his qualifications as a carder and spinner. We are of opinion, however, that this does not constitute reversible error for the reason that the mistake is not on any essential or controlling feature of the defense. There was no contract that the plaintiff should be an expert in carding and spinning, and there was no allegation or evidence of such requirement.

There were allegation and evidence that the plaintiff was employed by the defendants to superintend this and the other departments of the mill. There was also evidence of the plaintiff to the effect that it was not necessary that a superintendent should be an expert in all departments of a mill, and a witness for the defense testified that while it was better for a superintendent to be an expert in all the departments, there were many mills run successfully where the superintendent was not such.

The mistake of the court therefore to which the exception was addressed is not on an essential or material matter, and does not, we think, justify or call for a new trial.

Speaking directly to this question in another part of the charge, in response to a prayer for instruction by defendant, the court told the jury: "If the jury shall find from the greater weight of the evidence that it was necessary for a superintendent of the defendant's mill, to successfully operate the same, to understand carding, spinning and weaving in order to intelligently direct those under him in those departments, and should further find from the evidence that the plaintiff did not sufficiently understand carding and spinning to enable him to direct those in charge of those departments, and that he did not intelligently direct and instruct those placed in charge of the carding and spinning on account of a lack of skill and knowledge on his part, then I charge you that this was a violation of the contract on the part of the plaintiff and the defendants had the right to discharge him from their employment, and the plaintiff is entitled to recover nothing in this action." This, we think, gave the defendants the full benefit of this feature of the defense, and, taking the charge as a whole, we are of opinion that the cause has been fairly and correctly submitted to the jury.

Judgment Affirmed.

MILLS v. LUMBER CO.

(Filed November 15, 1905).

Production of Papers —Administrative Order —Renewal of Motion.

1. Section 578 of The Code, which provides that the clerk or judge may in their discretion order either party to give to the other an inspection and copy, or permission to take a copy, of any papers containing evidence relative to the merits of the action, does not authorize an order that the respondent be required to *deposit the papers* in the clerk's office.

2. An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not *res judicata* and the motion can be renewed and a new order obtained.

ACTION by W. A. Mills against Biscoe Lumber Co., heard by *Judge R. B. Peebles*, on July 29, 1905, on appeal from an order made by the clerk in an action pending in the Superior Court of MONTGOMERY County. From an order reversing the order of the clerk, the defendant appealed.

Adams, Jerome & Armfield for the plaintiff.
Hinsdale & Hinsdale for the defendant.

CLARK, C. J. The Code, section 578, provides that the court, i. e., clerk (Code, section 132), or judge, "may in their discretion and upon due notice order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession or under his control containing evidence relating to the merits of the action or the defense therein." This was a motion in the cause by the defendant before the clerk for an inspection of papers, etc., of that nature in possession of the plaintiff. The clerk made an order re-

quiring the plaintiff to "produce and deposit in the office of the clerk" certain papers described in the order, and that "in order that the defendant, its agents or attorneys may in the presence of the clerk examine and take copies thereof, it is further ordered that said notes, letters, papers, documents and books of account shall be deposited in said clerk's office on or before 12 August, 1905, and shall remain in said office two weeks."

The plaintiff excepted "to so much of the order as requires the plaintiff to deposit the papers with the clerk and allow them to remain two weeks." On appeal the judge briefly entered, "The above judgment is reversed." The judgment of the clerk was erroneous in the particular excepted to. There is nothing in the statute which authorizes an order that the respondent be required to *deposit the papers*. In practice, this might prove oppressive and detrimental. The papers and books might be necessary in the conduct of the plaintiff's business and there is no guaranty of their safety when so deposited. All that the statute authorizes is an order that the papers be produced with sufficient opportunity to the other side to inspect the same and take a copy. *Sheek v. Sain,* 127 N. C., 272.

The judge probably did not intend to do more than reverse the part of the order objected to. But if he did, it was a discretionary matter, and the order being an administrative order in the cause and not affecting the merits, it is not *res judicata* and the motion can be renewed and a new order obtained, in the discretion of the court or judge, of the tenor authorized by the statute. Indeed, the plaintiff is not resisting an order of that purport.

No Error.

JONES v. BALLOU.

(Filed November 15, 1905).

Action to Establish Lost Deed—Jurisdiction—Evidence.

1. In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action should have been brought before the clerk under section 56 of The Code, was properly refused, as that section is an enabling act giving an additional, but not an exclusive, remedy.

2. In an action to establish a lost deed, evidence offered by the defendants of a statement by a person that he owned no interest in the property, was properly rejected, where the plaintiffs did not claim under such person, and he was not a party to the action.

3. An exception not set out in appellant's brief is presumed to be abandoned.

ACTION by T. J. Jones and others against J. R. Ballou and others, heard by *Judge W. R. Allen* and a jury, at the April Term, 1905, of the Superior Court of ASHE County. From a judgment for the plaintiffs, the defendants appealed.

R. A. Doughton for the plaintiffs.
F. A. Linney and *T. C. Bowie* for the defendants.

CLARK, C. J. This is an action to establish a lost deed, the record of which is also alleged to have been destroyed. The defendants moved to dismiss upon the ground that the action should have been brought before the clerk under section 56 of The Code. This motion was properly refused. That section is an enabling act giving an additional, but not an exclusive, remedy. Jurisdiction in the Superior Court was sustained in *McCormick v. Jernigan*, 110 N. C., 406, and was tacitly recognized in *Tuttle v. Rainey*, 98 N. C., 513; see also 19 A. & E. Enc. (2nd Ed.), 552, with authorities. In *Cowles*

v. Hardin, 91 N. C., 231; *Mobley v. Watts,* 98 N. C., 284, and *Hopper v. Justice,* 111 N. C., 420, it was held that a party whose deed with its registration had been destroyed instead of having it set up and recorded could depend upon the rules of the common law to establish its contents whenever an occasion might arise, as in the course of a trial. *Cowles v. Hardin,* 79 N. C., 577, relied on by the defendants, simply holds that when the proceeding is brought by virtue of The Code, section 56, the requirements of that section must be complied with. It is true that originally there was no relief at common law or in equity to decree the re-execution of a deed, except as an ancillary remedy to some other relief as ejectment or to enjoin a recovery and the like, Adams, Eq., sec. 167; *McCormick v. Jernigan, supra;* but chapter 6, Laws 1893, gives the right to bring an action to prevent a cloud upon title and this additional relief the plaintiffs are entitled to besides the decree for setting up and recording the deed, whether such relief is prayed for or not. Clark's Code (3 Ed.), sec. 233(3), and cases there cited.

No other of the exceptions taken are relied upon in the appellant's brief and we presume were abandoned (*State v. Register,* 133 N. C., 751), except the sixth which was to the rejection of the evidence of C. D. Moore of a statement by Calvin Graybeal that he owned no interest in the property. The plaintiffs do not claim under said Calvin, and he is not a party to the action.

No Error.

BILES v. RAILROAD.

(Filed November 15, 1905).

Railroads—Nonsuit—Defective Appliances—Negligence—Assumption of Risk—Fellow Servant Act—Contributory Negligence—Rules, Violation of—How Waived.

1. On a motion for nonsuit or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true and construed in the light most favorable for him.

2. In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant, by reason of the Fellow Servant Act.

3. While the mere working on in the presence of known and dangerous conditions, but in the honest effort to discharge his duty faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases against railroads from injuries from defective appliances, the plaintiff is absolved from all care on his own part.

4. Except in extraordinary and imminent cases, like those of Greenlee and Troxler cases, the plaintiff in actions for negligence against railroads is required to act with that due care and circumspection which the presence of such conditions require, and if apart from the element of assumption of risk, he has been careless in a manner which amounts to contributory negligence, his action must fail.

5. The violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery.

6. Where a rule is habitually violated to the knowledge of the employer or where a rule has been violated so frequently and openly, and for such a length of time, that the employer could by the exercise of ordinary care have ascertained its non-observance, the rule is considered as waived or abrogated.

BILES *v.* RAILROAD.

ACTION by David Biles against Seaboard Air Line Railway to recover damages for an injury caused by alleged negligence of the defendant, heard by *Judge George W. Ward* and a jury, at the June Term, 1905, of the Superior Court of ANSON County.

The three ordinary issues in actions of this character were framed for submission to the jury: (1) As to the negligence of defendant; (2) As to contributory negligence on the part of plaintiff; (3) On the question of damages. At the close of the testimony on an adverse intimation of His Honor both on the first and second issues, the plaintiff submitted to a nonsuit and appealed.

H. H. McLendon and *J. A. Lockhart & Son* for the plaintiff.

John D. Shaw and *Adams, Jerome & Armfield* for the defendant.

HOKE, J., after stating the case: In *Hopkins v. Railroad,* 131, N. C., 464, *Douglas, J.,* delivering the opinion, said: "It is well settled that on a motion for nonsuit or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true and construed in the light most favorable for him." Applying this rule to the facts set forth in the case on appeal, we are of opinion that the plaintiff is entitled to have his cause submitted to a jury.

The plaintiff himself testified that he was a brakeman on a freight train of defendant company, and on the night of November 29, 1902, was injured by having his foot run over and crushed by the engine of the train with which the plaintiff was then working; that the injury occurred as the train was entering on the yard at Hamlet, N. C., where there were a great many tracks and switches; that it was a part of the plaintiff's duties at such times to keep a lookout in front of

the engine, and his proper placing for the purpose was on the pilot of the engine.

Selecting a portion of his testimony from the notes of the evidence sent with the case in the form of questions and answers, we find this statement.

"Q. Go on and state how you were hurt? A. I was on the front part of the engine, on the standard step, where I always had to ride, going into a yard.

Q. Why did you ride there going into the yard? A. To look out for the switches and loose cars.

Q. Why did you ride there to look out for switches? A. That was my duty.

Q. To look out for switches and cars? A. Yes, loose cars would roll down sometimes and we would change the switches right quick. I would always have to ride so I could throw the switch.

Q. What do you mean by throwing the switch? A. Changing the switch from one track to another.

Q. That is, you kept the switches in their proper place and order? A. Yes.

At another point the plaintiff testified that he could not properly perform the duties unless he was stationed in front on the pilot, and that the defendant would not keep a man who could not keep the train moving, but was so slow that he would require it to stop to enable him to do his work; that in order to enable employees, charged with this duty, to hold their positions, there was usually a short step on the face of the pilot, eight to ten inches long and wide enough for the placing of one foot, and a bar or rod along the beam of the pilot by which the brakeman could hold on with reasonable safety when the train was in motion; that this particular engine had the step, but did not have the rod or other means to enable the plaintiff to hold properly, and as the engine was going into the yard it jostled or careened in some way—probably by a depression in the

rail; that the plaintiff's foot was jarred from its position on the step, and, not being able to hold, his foot slipped under the forewheel of the engine, was crushed as stated and finally had to be amputated, etc.

If these facts are established, there would seem to be a case of negligent injury, not unlike that of *Coley v. Railroad,* 128 N. C., 534, and unless the facts are successfully controverted or the plaintiff himself has failed to exercise proper care in the matter, there would be an actionable wrong.

The judge below also expressed an intimation adverse to the plaintiff on the issue of contributory negligence. Without going into a detailed statement of the testimony, we are of opinion that on this issue also the case should be submitted to the jury under proper instructions. The plaintiff has stated in one place that it was a dangerous duty and he had looked for some one to get hurt in performing it. But so far as the mere working on in the performance of a dangerous duty is concerned, this, while sometimes spoken of as contributory negligence, is usually and more properly classed and considered under the head of assumption of risk, and being a contractual defense, where it is allowed, is not open to the defendant by reason of the statute. Private Laws 1897, chap. 56, sec. 1. This statute provides that any employee who is injured by any defect in the machinery, ways or appliances of a railroad company shall be entitled to maintain an action; and section 2 provides that any contract or agreement, expressed or implied, made by any employee to waive the benefit of the aforesaid section shall be null and void. If, in answer to the first issue, the jury should find that the plaintiff, while in the performance of his duty was injured, as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant. *Coley v. Railroad, supra;* s. c. 129 N. C., 407.

While the mere working on in the presence of known and

dangerous conditions, but in the honest effort to discharge his duty faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases of the kind we are now considering, the plaintiff is absolved from all care on his own part. Except in extraordinary and imminent cases, like those of *Greenlee* and *Troxler,* 122 N. C., 977, and 124 N. C., 189, he is still required to act with that due care and circumspection which the presence of such conditions require, and, if apart from this element of assumption of risk, the plaintiff has been careless in a manner which amounts to contributory negligence, his action must fail.

There is evidence here tending to show that the plaintiff, at the time of the injury in taking his position on the pilot of the engine, was acting in violation of the rules of the company. While the disposition of the present appeal does not require that we consider evidence making for the defense, we deem it well to note that the violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and enforced, and does not obtain where a rule is habitually violated to the knowledge of the employer or of those who stand towards the employer in the position of vice principals, or when a rule has been violated so frequently and openly, and for such a length of time, that the employer could by the exercise of ordinary care have ascertained its non-observance. Under such circumstances, the rule is considered as waived or abrogated. 5 Thompson Law of Negligence, sec. 5404; Beach Cont. Neg., sec. 373.

There was error in the ruling of the court below and the plaintiff is entitled to have his cause submitted to the jury.

New Trial.

CLARK, C. J., and WALKER, J., concur in result.

SHEPPARD v. NEWTON.

(Filed November 15, 1905).

Statute of Frauds—Debt of a Third Person—Evidence.

1. Where a defendant has made a promise to answer the debt of another and seeks protection under the provisions of section 1552 of The Code, it must be shown that the debt is that of a third person, and that such person continues liable for the same. If the debt claimed is an original obligation of the defendant, or if the creditor, in accepting the obligation or promise of the defendant and in consideration thereof, has released a third person who was the original debtor, the statute has no application.

2. In an action to recover balance of house rent where the plaintiff testified that he rented the house to the defendant through an an agent and that the defendant paid the rent in person and through his employer, and that the defendant promised to pay the balance due and the employer testified that he charged the money to the defendant's account; and the defendant testified that he paid the rent for his mother and that he never rented the house, and the agent testified that he did not rent the house to the defendant, *held*, that the plaintiff is entitled to have the case submitted to the jury on the question whether the defendant is not answerable as the original or present debtor.

ACTION by B. J. Sheppard against Jerry Newton to recover $81 alleged to be due for the rent of a house, tried on appeal from a justice of the peace, by *Judge Henry R. Bryan* and a jury, at the September Term, 1905, of the Superior Court of FORSYTH County. The defendant denied any and all liability on the issue as to indebtedness. Both sides offered testimony as follows:

The plaintiff testified: "I claim $81 and interest from the defendant as house rent. The defendant had rented the house for two or three years. The house was rented at first to Rufe Ogburn; he occupied it over a year and then exchanged houses with the defendant Newton, and Newton and his father's family went into the house. Ogburn and

Newton exchanged houses in 1898. I never rented the house to the defendant's father. The defendant paid me $200 or $300 on account of rent, and no one else ever paid any rent. The house rented for $9 per month; the defendant paid the rent; his last payment was December 4, 1901, and that was paid after the defendant gave up the house—two months after. Sometimes the defendant would pay in cash and sometimes through Lipfert, Scales & Co.; the defendant worked with them. I rented the house to Rufe Ogburn; never rented it to anyone else except through Ogburn; I never rented it to the defendant except through an agent. The father and mother of the defendant lived there in the house, I suppose. I collected rent from the defendant, and he said he would be responsible for it. There is still a balance of $81 due from the defendant for rent."

Frank Lipfert, for plaintiff, testified: "The defendant worked for me. I paid the plaintiff money for the defendant several times and charged it to the defendant's account."

Rufus Ogburn, for the defendant, testified: "I rented the house twelve months and exchanged it with Mrs. Newton and she went in there. I received the rent from Mrs. Newton. Jerry Newton lived there until he was married there; I never said a word to him about it."

The defendant, as witness for himself, testified: "I never rented from Sheppard or promised to pay him anything; don't know who rented the house. I paid Sheppard for my mother; I boarded with her; I boarded there sometime; I don't know that I paid the rent after I left there; I think I paid some after I quit boarding there. After I left there I paid, I think, what was paid. I don't know who rented the house from Sheppard nor how much it rented for; I never promised to pay the rent. Sheppard kept writing to me about it so sharp, I just concluded that I would not have any more to do with it."

The plaintiff then testified as follows: "I would get after

Newton and urge him to pay me this balance of $81, and he would tell me he would pay it as soon as convenient. On one occasion he promised to pay me, but said he was then building a house and was hard up for funds."

On motions made in apt time by the defendant, there was judgment dismissing the action as on nonsuit and the plaintiff excepted and appealed.

Lindsay Patterson for the plaintiff.
No counsel for the defendant.

HOKE, J., after stating the case: His Honor below directed a nonsuit, holding that on the foregoing testimony, recovery by the plaintiff was prevented by the Statute of Frauds, Code, sec. 1552, which provides, among other things, that no action shall be brought to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement shall be in writing.

When a defendant has made a contract or promise of this character, otherwise binding and seeks protection under the provisions of this statute, it must be shown that the debt is that of a third person, and that such person continues liable for the same. If the debt claimed is an original obligation of the defendant, or if the creditor, in accepting the obligation or promise of the defendant and in consideration therefor, has released a third person who was the original debtor, the statute has no application. This instance of the doctrine is well expressed by *Butler, J.*, in *Packer v. Benton,* 35 Conn., 350, where the promise to which this feature of the statute applies is thus defined: "An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party, for whom the undertaking is made, continues liable."

A statement on the same subject, somewhat more extended and very satisfactory, will be found in Clark on Contracts,

p. 67, as follows: "There must either be a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily and not collaterally liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. If, for instance, two persons come into a store and one buys and the other, to gain him credit, promises the seller 'if he does not pay you, I will,' this is a collateral undertaking and must be in writing; but if he says, 'Let him have the goods and I will pay,' or 'I will see you paid,' and credit is given to him alone, he is himself the buyer, and the undertaking is original. In other words whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original; but it is collateral, if any credit was given to the other party." To like effect are the decisions of our own court. *Whitehurst v. Hyman,* 90 N. C., 487; *White v. Tripp,* 125 N. C., 523.

Applying these principles to the foregoing statement of the evidence, the court is of opinion that there was error in directing a nonsuit, and the plaintiff is entitled to have his cause submitted to the jury on the question whether the defendant is not answerable as the original or present debtor on the plaintiff's demand.

New Trial.

STATE v. ARCHBELL.

(Filed September 12, 1905).

Argument of Solicitor — Objections — Deadly Weapons — Questions for Jury—Assaults—Evidence.

1. The fact that no objection was made at the time and the court below was not asked to interfere and correct the effect of the denunciation of the solicitor in his argument to the jury, precludes this court from considering it.

2. Some weapons are *per se* deadly and others, owing to the violence and manner of use, become deadly.

3. Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to the jury with proper instructions.

4. A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or great bodily harm under the circumstances of its use.

5. An assault committed by the defendant, a very strong, large and robust man, upon his wife, a very frail and weak woman, who was sick at the time, with a buggy trace two and a half feet long, is calculated to produce serious injury and possibly death.

INDICTMENT against W. J. Archbell, heard by *Judge Geo. W. Ward* and a jury, at the May Term, 1905, of the Superior Court of BEAUFORT County, for an assault upon Jessie Archbell, his wife, with a deadly weapon. From the judgment and sentence of the court, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
E. S. Simmons for the defendant.

BROWN, J. The testimony relied upon by the State tended to prove that the defendant assaulted his wife by severely

beating her with a large leather strap, being part of a buggy trace, about two and a half feet long. There was also testimony tending to prove that at the time the wife was very sick. These charges were all denied by the defendant on the stand, and he offered other evidence tending to discredit them.

In the very able brief of Mr. Simmons, counsel for defendant, it is contended with much feeling and eloquence that the defendant was greatly prejudiced by the alleged vehement denunciation of the solicitor in the argument to the jury, and the able counsel presents authority to sustain his position. It is admitted in the brief that no objection was made at the time and that the court was not asked to interfere and correct the effect of the solicitor's denunciation. No such exception appears in the record. This necessarily precludes us from considering it. The matter should have been called to the attention of the court at the time in order that the judge might have an opportunity to correct the solicitor, in case he should think the language was not warranted by the testimony. *State v. Suggs,* 89 N. C., 530; *State v. Lewis,* 93 N. C., 582.

The court submitted to the jury, with appropriate instruction, the question whether the instrument used was a deadly weapon, to which the defendant excepted. The court also properly instructed the jury to render a verdict of simple assault, or assault as charged, with a deadly weapon, or not guilty, as they should find the facts after fully satisfying themselves as to the truth of the matter.

We find no error in the instructions given by His Honor below. The charge is full and clear and supported by authority. Some weapons are *per se* deadly and others, owing to the violence and manner of use, become deadly. In the latter class of cases, where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and

necessary to submit the matter to the jury with proper instructions. *State v. Huntley,* 91 N. C., 621. The uncontradicted testimony shows that the defendant is "a very strong, large and robust man," and that the wife is a "very frail and weak woman." There is also evidence that at the time of the assault she was sick. Under such circumstances, for the husband to violently assault his weak, frail and sick wife with part of a buggy trace two and a half feet long, is not only brutal, but calculated to produce serious injury, and possibly death.

If His Honor erred in submitting the question of the deadly character of the weapon under the circumstances to the jury, we have no hesitation in holding that they solved it correctly upon the theory that the State had proved its contentions to their full satisfaction. *State v. Craton,* 28 N. C., 181. A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or great bodily harm under the circumstances of its use. The deadly character of the weapon depends sometimes more upon the manner of its use and the condition of the person assaulted than upon the intrinsic character of the weapon itself. *State v. Sinclair,* 120 N. C., 603; *State v. Norwood,* 115 N. C., 789. An instrument which might be harmless when used upon a strong man, may become deadly when used upon a very frail and delicate woman. We have considered every exception taken by the defendant and examined every authority referred to in the carefully prepared brief furnished us by his counsel. We are unable to find any error.

No Error.

STATE v. MURRAY.

(Filed September 19, 1905).

Homicide — Positive and Negative Testimony — Instructions—Recital of Evidence—Error Cured.

1. Where it was material for the State to show that the prisoner fired the fatal shot, and several witnesses were introduced who swore positively that when the fourth shot was fired the weapon was in the hands of the prisoner, while other witnesses testified that they did not see the pistol, and did not know in whose hands it was when the fourth shot was fired, an instruction that it was the jury's duty to give to positive testimony greater weight than they give to negative testimony, and that the testimony of the former witnesses was what the law terms positive, and that the testimony of the latter was negative, was proper, where the judge followed it up by adding an instruction that left the credibility of the witnesses to the jury.

2. An error in reciting the evidence is cured by the failure of counsel to call it then and there to the attention of the court and have it corrected.

INDICTMENT for murder against W. R. Murray, heard by *Judge R. B. Peebles* and a jury, at the January Criminal Term, 1905, of the Superior Court of DURHAM County. From a verdict and sentence for manslaughter, the prisoner appealed.

Robert D. Gilmer, Attorney-General, and *Argo & Shaffer* for the State.

Fuller & Fuller, Manning & Foushee, Boone & Reade, Winston & Bryant and *J. Crawford Biggs* for the defendant.

CLARK, C. J. This is an indictment for murder and an appeal from a conviction and sentence for manslaughter. It was material for the State to show that the prisoner fired the fatal shot, and several witnesses were introduced who swore

positively that when the fourth shot was fired the weapon was in the hands of the prisoner, while other witnesses testified that they did not see the pistol and did not know in whose hands it was when the last or fourth shot was fired. Upon this point His Honor instructed the jury as follows: "The law says that it is your duty to give to positive testimony greater weight than you give to negative testimony. The testimony of those witnesses who swore positively that they saw the pistol in the hand of the prisoner and that he fired the fatal shot while the pistol was in his hand, is what the law terms positive testimony. They swear positively that they saw the existence of a fact. The testimony of the witnesses who said that they saw the prisoner and the deceased in a struggle at the time when the last shot was fired, but they did not see the pistol and did not know in whose hand the pistol was, is what the law terms negative testimony. The reason the law gives greater weight to positive testimony than to negative testimony is because the witnesses who swore to positive testimony swore to what is a fact, an existing fact, or else they deliberately swore to a falsehood, while those who swore to negative testimony may be telling the truth and yet the fact may exist which they did not see. If one witness swears that he saw Sheriff Markham in the court house in Durham on a certain date, the sheriff was there, or else the witness told a lie. Another witness might say, 'I was in the court house on that occasion, but I did not see Sheriff Markham in there;' that witness may be telling the truth and may be conscientious and yet it may be a fact, notwithstanding, that Sheriff Markham was in the court house, and for that reason the law says you must attach greater weight to positive testimony than to negative testimony."

This was excepted to but is consonant with reason and the precedents. In *Henderson v. Crouse,* 52 N. C., 623, the judge below told the jury that "positive testimony was en-

titled to more weight than negative." On appeal this court said: "The instructions as to the relative weight of positive and negative testimony is far from error. The rule as laid down has been long established and followed that there is a difference and that the positive is entitled to more weight than the negative is not only an accepted legal maxim, but is founded, as we think, in truth and justice. The amount of difference the court did not undertake to decide and could not as it was a question for the jury. In all cases force of testimony, whether positive or negative, must depend upon a variety of collateral facts and circumstances. For instance, the force of negative testimony must manifestly depend upon the opportunities of observation afforded to the witness. These opportunities might be so favorable and frequent as to approach in weight to a positive statement; yet we take it when the positive is in conflict with negative under any ordinary circumstances, the witnesses being equally credible, the former should preponderate. Negative testimony assuredly might be accumulated from different quarters and under certain circumstances countervail entirely positive testimony, but this is not the question. The question made is whether it be correct to declare as a naked proposition of law, stripped of matter that may affect the weight of either, that positive testimony is entitled to more weight than negative."

This ruling has been cited and approved in *Reeves v. Poindexter*, 53 N. C., 308; *State v. Horan*, 61 N. C., 575, in which *Battle, J.*, a most careful judge, says: "Where there is affirmative and negative testimony it must be left to the jury, with instructions that the former is entitled to more weight than the latter;" *Smith v. McIlwaine*, 70 N. C., 289; *State v. Campbell*, 76 N. C., 263, in which the identical words stated by *Battle, J., supra*, are again used; *State v. Gardner*, 94 N. C., 957, and the late case of *Canfield v. Railroad*, 111 N. C., 601, where *Avery, J.*, says: "We concur with His Honor in the opinion that the evidence * * * on the one side was pos-

itive and was entitled to greater weight than that adduced by the other. There was no error in his reading, as he did, from *Henderson v. Crouse,* 52 N. C., 624."

In the present case the judge followed up the above instruction excepted to by adding: "The law says also it is your duty to reconcile an apparent conflict of testimony if you can do it. If you cannot do it, it is then your duty to march up like men and pass upon the testimony and to say which of the witnesses have told the truth and which have told a falsehood and base your verdict accordingly."

The matter was thus left to the jury, in the last analysis, and the instruction as to the consideration to be given to positive and negative testimony was in accordance with the uniform rulings in this State. The same rule is laid down in *Stitt v. Huidekoper,* 84 U. S., 395; 3 Rice Cr. Ev., sec. 266, and in a vast mass of cases to the same purport, from nearly all the States as well as Federal Courts collected 20 Cent. Digest pp. 3575-3583. The precedents are overwhelming and the principle is too well based upon reason to be shaken. It is a reason and principle that any man would act upon in the ordinary affairs of life that when there is positive and negative testimony he will believe and act upon the former when the witnesses are of equal credibility and His Honor left the credibility of the witnesses absolutely to the jury, telling them "to reconcile the evidence if they could; if not, then to find who had told the truth."

The jury came back after some hours' deliberation and informed the court that "some of the jurors seemed to have gotten mixed up as to positive evidence and negative evidence." To this the court replied: "I don't know whether I can give you any instructions on this subject that will make it any plainer. Positive evidence is where a man swears positively that he saw anything, or anything existed; negative evidence is where a man says 'I did not see anything.' The defendant introduces a large number of witnesses. I do not remember

how many, 16 I think—and they said they saw a scuffle, and the pistol was in the hands of Joe and Bob Murray; that they do not know who had the pistol when this last shot was fired. Now the court is of opinion that the main question is as to where the pistol was when it was fired the last time, and the court charged you before, and reiterates now, that if the pistol was taken away from Mr. Joe Murray by Mr. Bob Murray, and you find that to be a fact, beyond a reasonable doubt, and he pulled the trigger and fired the shot that killed Joe Murray, then, as the court charged you before, he would be guilty, either of murder in the second degree or manslaughter, according as you find one or the other to have commenced the difficulty; that is, who commenced the fight, not the quarrel, but the fight. If the whole evidence leaves you in a reasonable doubt about who shot the pistol that killed Joe Murray, then it is your duty to give the defendant the benefit of that doubt and say he is not guilty."

The prisoner insisted that the court charged that "The testimony of the State's winesses was positive and the testimony of the defendant's witnesses was negative." This is not done in any part of the charge nor is it a just inference from what was said by the judge. In stating the contentions of the parties he mentions (as was proper) that the "State contends that it had produced nine witnesses who testified positively, as it claims, that the prisoner fired the fatal shot and that they were not contradicted." Also in the instruction above quoted, given on the return of the jury and on their request for further instructions, His Honor said that the "defendant introduced a large number of witnesses—I don't remember how many, 16, I think—and they said they saw a scuffle * * * that they did not see the pistol when this last shot was fired." But he did not say that all of defendant's witnesses so testified (though in fact each of them did testify that they did not know who fired the last shot), nor does he con-

trast their testimony by saying that the testimony of all the State's witnesses was positive. Hertz, one of prisoner's witnesses, after testifying that he "did not know" who fired the pistol, further said that "he only saw two hands grabbing the pistol, that both had the pistol." Another of defendant's witnesses said in effect the same. This would hardly contradict the judge in a material particular, even if he had said (which he did not) that all of defendant's witnesses testified that they did not know who had the pistol when the last shot was fired, for both these witnesses stated that they did not know who fired the last shot, which was the material point, and not whether one or both men had hold of it. But if it were conceded that there was a material inadvertence, it was certainly not an error of law, but an inadvertent error in reciting the evidence, which was cured by the failure of the counsel to call it then and there to the attention of the court and have it corrected. *State v. Grady,* 83 N. C., 646 (indictment for murder), in which *Smith, C. J.,* says: "It was the duty of counsel, if evidence important to the defense had been overlooked, then to call it to the attention of the judge and have the omission supplied. It would be neither just to him nor conducive to a fair trial to allow this neglect or oversight, attributable to counsel quite as much as to the judge, to be assigned for error entitling the accused to another trial, whatever force it might have in influencing the court in the exercise of an unreviewable discretion to grant it." This has been approved in *State v. Reynolds,* 87 N. C., 546; *State v. Gould,* 90 N. C., 662; *State v. Debnam,* 98 N. C., 717; *Cathey v. Shoemaker,* 119 N. C., 427.

It would be detrimental to the administration of justice if a serious trial, occupying probably many days, and conducted at great expense, should be gone over again for a slight inadvertence of the judge in stating the evidence, when counsel could at once have had the error (if prejudicial) corrected upon the spot by calling the matter to the attention

of the court. The prisoner was not *inops consilii,* but was represented by nine of the ablest lawyers at one of the ablest bars in the State. If the recital of the evidence in this particular was erroneous and prejudicial, they would surely have noticed it and asked its correction. Such request for correction of the statement should have been asked for then when it could have been easily made and not in this court on appeal.

Besides His Honor told the jury that if their recollection differed from the evidence read over to them or as detailed by counsel, that "the jury are the sole judges of what the witnesses said and the sole judges of how much faith and credit should be put in the testimony of each and every witness who was examined before you."

The court also charged the jury at the request of the prisoner: "The State must satisfy the jury beyond a reasonable doubt that the prisoner fired the shot which inflicted the wound upon J. S. Murray from which he died. If the jury, *considering all the testimony,* are left in doubt whether the prisoner fired the fatal shot which killed J. S. Murray, the prisoner is entitled to the benefit of that doubt and the jury will render a verdict of not guilty."

No Error.

STATE v. DAVIS.

(Filed September 19, 1905).

Eavesdropping—Indictment—Motion of Quash.

An indictment for eavesdropping was defective which failed to charge that the conduct described was habitual, or facts from which such habit could be inferred, and also failed to allege that anything so heard was repeated in the hearing of divers persons and a motion to quash was properly allowed.

INDICTMENT against Jordan Davis for eavesdropping, heard by *Judge J. L. Webb* and a jury, at the April Term, 1905, of the Superior Court of PITT County. The defendant was indicted under the following bill: "The jurors for the State upon their oaths present that Jordan Davis, late of the County of Pitt and State of North Carolina, on the 15th day of April, 1905, at and in said county and State, being a person of evil mind and disposition, wilfully and unlawfully did approach the dwelling house of one L. H. Smith, then and there in the actual possession of one Eva Smith, his wife, in the night time, peeping in the window, turning the blinds and eavesdropping the conversation and looking into the rooms, to the great terror and disturbance of the family, to the annoyance and inconvenience of the inhabitants of said house, to the evil example of all others in like cases offending, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State." On motion of the defendant, there was judgment quashing the indictment. The State excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
Skinner & Whedbee for the defendant.

HOKE, J. There is no error. Eavesdropping is a criminal offense at common law defined as follows: "Eavesdrop-

pers are such as listen under the walls or windows or eaves of houses to hearken after discourse and thereupon proclaim slanderous and mischievous tales." 4 Blk., 168. Mr. Wharton, in his work on criminal law, says of the offense that in order to be indictable at common law it should be habitual, and combine the lurking about dwelling houses and other places where persons meet for private discourse, secretly listening to what is said and then tattling it abroad.

The indictment before us is defective in that it fails to charge that the conduct described was habitual or facts from which such habit could be inferred, and also fails to allege that anything so heard was repeated in the hearing of divers persons. Mr. Bishop, in his new criminal law, describes the offense as a common nuisance in hanging about the dwelling house of another, hearing tattle and repeating it to the disquiet of the neighborhood. This author, in his new criminal procedure, suggests the form of a bill in terms as follows: "That A, late of, etc., and on each and every day thence continually until the day of the finding of this indictment was, and is, a common eavesdropper, and there continually and on each and all of the days and times did listen about the houses and under the windows and eaves of the houses of the people there dwelling, hearing tattle and repeating it in the hearing of all persons, to the common nuisance, etc., and against the peace," etc. In commenting on the proof required for conviction, he says it may be desirable, and is perhaps legally necessary, to prove at least three instances of offending, from which, and from the more general evidence, the jury will infer the habit of eavesdropping, wherein probably is the gist of the offense.

There is no Error.

STATE v. DANIEL.

(Filed September 26, 1905).

Homicide—Premeditation and Deliberation—Cooling Time —Questions for Jury—Evidence.

1. Where the design to kill is formed with premeditation and deliberation, it is not necessary for it to exist any definite length of time before the killing actually takes place.

2. Where a prisoner who has killed a person displays thought, contrivance and design in the manner of securing and handling his weapon, such exercise of contrivance and design denotes deliberation—the exercise of judgment and reason rather than violent and ungovernable passion.

3. The existence of premeditation and deliberation is a fact to be found by the jury when there is any evidence to warrant the finding.

4. Where, without any provocation in law or in fact, the prisoner who is carrying a concealed and loaded weapon on an excursion train, takes it from his left pocket, transfers it behind his back to his right hand, raises it and points it at the deceased, warning him to "look out" and then fires the fatal shot, and leaves the car singing a flippant song, *held*, that this is sufficient evidence of premeditation and deliberation.

5. If the prisoner slew on a principle of revenge for a fancied wrong, which was very trivial in its nature, having fully made up his mind to kill to avenge it, he is guilty of the capital felony.

INDICTMENT for murder against Preston Daniel, heard by *Judge Geo. W. Ward* and a jury, at the June Term, 1905, of the Superior Court of MARTIN County. From a conviction of murder in the first degree, and the sentence pronounced thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.

No counsel for the prisoner.

WALKER, J. The defendant was indicted for the murder of William Eborn. He was convicted of murder in the first degree and from judgment rendered upon the verdict he appealed. There is but one exception. At the close of the testimony the defendant's counsel requested the court to charge the jury that "There is not sufficient evidence of premeditation and deliberation on the part of the defendant and that upon the evidence the jury is not warranted in convicting the defendant of a graver offense than murder in the second degree." The court refused to give this instruction and the defendant excepted. The court then charged the jury fully upon the law and the evidence, and explained to them the different degrees of homicide as defined by the statute, but did not in its general charge give the instruction requested by the defendant.

It is well settled that if there was any evidence to support the verdict, the defendant must fail in his contention.

We think there was not only some, but abundant evidence of premeditation and deliberation. To demonstrate this, requires us to state the substance of the testimony. The defendant and the deceased were on an excursion train going to Parmalee. When they arrived at that place the defendant got off the train and went to a bar for some whiskey. When he came back to the car the deceased was sitting by Gertrude Little, who was escorted by the defendant. The latter then told the deceased that he must not sit by his girl when he was out. The deceased got up and walked over to the other side of the car and sat down, saying at the time, "This is a diabose crowd." When the defendant heard that remark he drew his pistol from his left pocket and put it in his right hand, and then "hollored 'look out' as the deceased turned his head," the ball striking the latter over the eye. When the defendant shot, he threw his head back twice and then left the car, and sang a song, "I am going where I have never been before." A witness, Almira Little, testified that

she saw the defendant with the pistol in his hand, and when he shot Eborn, and that "it was not any time hardly" after she saw him with the pistol before he fired, and that Eborn was not doing anything when the defendant shot. He had the pistol in his hand when she first saw him, and his hand was resting on his knee. There had been no previous quarrel or altercation between the parties. Another witness saw the defendant take his pistol from his left pocket and carry it around his body to his right hand and hold it behind him, "or so that the witness could not see it long enough to shake hands." He then pointed it and said "look out" and fired at Eborn, who had a cigar in his mouth. This witness also stated that they had not been mad with each other. Gertrude Little testified: "I was on the excursion that day; prisoner was my company. Just a little before the train got to Parmalee, prisoner came in and sat in front of me. The seat I was in faced his. Eborn had not been sitting with me at all. I looked out of the window." The case was not argued in behalf of the defendant in this court, and therefore we are at a loss to know upon what ground it was contended below that there was no evidence of premeditation and deliberation. We can only conjecture that it was thought a sufficient time had not elapsed to weigh the matter and form a definite and deliberate purpose to kill, or that the absence of any previous animosity towards the deceased disproved premeditation, or that the defendant was suddenly aroused to anger when he saw the deceased sitting with his girl, and shot immediately in hot blood, being under the influence of *furor brevis,* and without time to think and form a cool and deliberate purpose to kill. All of these contentions, while somewhat differently stated, are practically one and the same in substance and in law. It will of course not be denied that, where the design to kill is formed with premeditation and deliberation, it is not necessary for it to exist any definite

length of time before the killing actually takes place. *State v. Spivey,* 132 N. C., 989.

Now as to the other question. In *State v. Lipscomb,* 134 N. C., 694, we said: "There was ample time for deliberation and premeditation by the defendant according to any rule that has been laid down upon the subject. No particular time is required for this mental process of premeditation and deliberation. The question always is, whether, under all the facts and circumstances of the case, the defendant had previously and deliberately formed the particular and definite intent to kill and then and there (or at any time afterwards) carried it into effect. This is a question for the jury to determine," citing *State v. Johnson,* 47 N. C., 247, and *State v. McCormac,* 116 N. C., 1034. "The question whether or not there has been deliberation" (says Kerr in his work on Homicide, sec. 72,) "is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense," or, we may add, to be aware of what he is about to do and its consequences. And again: "Where a prisoner who has killed a person displayed thought, contrivance and design in the mode of possessing himself of the weapon used or of disposing of it immediately after the blow was struck (or, we will say in this case, in the manner of securing and handling his weapon, as the defendant did), such exercise of contrivance and design denotes deliberation—the presence of judgment and reason rather than violent and ungovernable passion." P. 72. We have uniformly held that the existence of premeditation and deliberation is a fact to be found by the jury, when there is any evidence to warrant the finding. Can it be said there is no such evidence here? Without any provocation in law or in fact the defendant, who is carrying a concealed and

loaded weapon on an excursion train, takes it from his left pocket, transfers it behind his back (a fact which indicates a purpose to conceal his action) to his right hand, in which he could use it more readily and effectively, raises it and points it at the deceased, warning him to "look out" and then fires the fatal shot. When we consider these facts in connection with the utter and cold indifference of the defendant after the shooting, what more deliberate act upon previous reflection and meditation, we may well ask, could be imagined than this one. The evidence was quite as strong as it was in *State v. Hunt,* 134 N. C., 684; *State v. Teachey,* 138 N. C., 587; *State v. Exum, Ibid.,* 599; *State v. Conly,* 130 N. C., 683; *State v. Lipscomb* and *State v. McCormac, supra,* in which convictions for the capital felony were sustained. Indeed, the defendant's intent to kill was more calmly and deliberately conceived and executed than was the intent of any one of the defendants in the cases above cited. There was some ground to argue in those cases that the slayer might have committed the act in a transport of passion, but there is no evidence in this case to indicate anything but coolness of design and a deliberate purpose recklessly and wantonly to take human life, all of which was prompted by a bad heart, desperately wicked and fatally bent upon mischief. The mere fact that the defendant accomplished his purpose within a comparatively short space of time can make no difference. What he did just before he killed, and his conduct just afterwards, coupled with what he then said and the manner of saying it—his flippant song—all tended to show that he was cool and deliberate when he shot and in the full possession of his faculties, being not at all under the influence of any violent or ungovernable passion. The slight provocation, if provocation it may be called, upon which he may have acted, was not calculated, as it seems to us, to arouse his anger to such a degree as to dethrone his reason for the time or to render him incapable of deliberate thought, even

in view of the shortness of time which elapsed. "The celerity of mental action is such that the formation of a definite purpose may not occupy more than a moment of time; hence the important question in such a case is to determine whether the external facts and circumstances, at the time of the killing, as well as before and after that time, having connection with, or relation to it, furnished satisfactory evidence of the existence of a calm and deliberate mind on the part of the accused at the time the act was committed. If they show a formed design to take the life of the person slain, or to do him serious bodily harm, which in its necessary or probable consequences may end in his death, he is guilty of murder in the highest degree." Kerr on Homicide, sec. 72. If the defendant slew on a principle of revenge for a fancied wrong, which was very trivial in its nature, having fully made up his mind to kill to avenge it, he is still guilty of the capital felony. "For let it be observed that, in all possible cases, deliberate homicide upon a principle of revenge, is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort, but be they of what nature soever, he ought to bear his lot with patience." Foster's Crown Law, 296. The defendant was not entitled to the instruction he requested the court to submit to the jury, and it follows that there was no error committed on the trial below. It will be so certified.

No Error.

STATE v. TELFAIR.

(Filed September 26, 1905).

Appeal—Dismissal—Docketing—Duty of Appellant.

1. A motion to dismiss an appeal will be allowed, where the case was tried in October, 1904, and not docketed until the Fall Term, 1905; the appellant's excuse that the "case on appeal" was not settled by the judge till after it was too late to docket at the Spring Term in time for the call of the district to which it belongs, being of no force.

2. It is the duty of the appellant to docket the "record proper" in apt time, and upon the call of the district have asked for a writ of *certiorari* to perfect the transcript.

INDICTMENT against Eliza Telfair for resisting an officer, heard by *Judge T. J. Shaw* and a jury, at the October Term, 1904, of the Superior Court of FRANKLIN County.

Robert D. Gilmer, Attorney-General, for the State.
W. M. Person for the defendant.

Per Curiam: This case having been tried in October, 1904, should have been docketed here at last term. The defendant's excuse that the "case on appeal" was not settled by the judge till after it was too late to docket at last term in time for the call of the district to which it belongs, is of no force. It was the duty of the appellant to docket the "record proper" in apt time, and upon the call of the district have asked for a writ of *certiorari* to perfect the transcript. *Pittman v. Kimberly,* 92 N. C., 562; *Porter v. Railroad,* 106 N. C., 478, and numerous other cases cited in *Parker v. Railroad,* 121 N. C., p. 504, where it is said, repeating *Burrell v. Hughes,* 120 N. C., 278, "there are *some* matters settled, and this is one of them." *Norwood v. Pratt,* 124 N. C., 747, and cases cited; *Worth v. Wilmington,* 131 N. C., 533.

The motion of the Attorney-General to dismiss the appeal must be allowed. Rule 16 of this court; *State v. Deyton*, 119 N. C., 880; *Hinton v. Pritchard*, 108 N. C., 412.

Appeal Dismissed.

STATE v. DEWEY.

(Filed October 3, 1905).

Embezzlement—Bill of Particulars—Premature Appeal—Appealable Order—Continuances—Discretion—Charge in Writing—"Instructions" Construed—Exceptions—Harmless Error—Fraudulent Intent—Case on Appeal.

1. The refusal to grant a motion for a bill of particulars, in an indictment for embezzlement, is not appealable, except possibly in a case of gross abuse of discretion.

2. If an appeal from a refusal to grant such application was permissible, it was premature. The defendant should have noted his exception, and if the final judgment was against him, he could have had the refusal reviewed on appeal therefrom.

3. Where the defendant had the benefit of the bill of particulars upon a renewal of the motion at a subsequent term, the appeal from a refusal at a previous term is useless.

4. It is only where the judgment is final and disposes of the entire controversy that an appeal transfers the cause to the appellate court and disables the court below from proceeding therein, and an exception to a refusal of a continuance because of a pending appeal from a motion for a bill of particulars is without merit.

5. The granting or refusal of a continuance is a matter necessarily in the discretion of the trial judge and not reviewable, certainly in the absence of gross abuse of such discretion.

6. Where before reading the written charge to the jury, the court stated orally that this was an important matter to the defendant and the State, and in arriving at a verdict they must not be governed or swayed by sympathy, prejudice or passion, but render such a verdict as is warranted by the evidence, there is nothing prejudicial to the defendant in this, nor is it a violation of section 414 of The Code, which requires a judge, when requested in apt time, to put his instructions in writing.

7. The word "instructions" as used in section 414 of The Code, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issues.

8. After the jury had been out some time, they returned into court and said that they could not agree. The court "stated it was the duty of a jury to reconcile the testimony, where there was a conflict, and if they could not reconcile the testimony, then it became their duty to adopt the most plausible theory of the evidence in arriving at a verdict." The jury then retired, and counsel for defendant called the attention of the court to what the defendant claimed was an error in leaving out the question of reasonable doubt and fraudulent intent. The court immediately called the jury back and re-stated to them what he had just told them and further stated that the State must satisfy them beyond a reasonable doubt of the fraudulent intent, etc., and read, the second time, his charge and defendant's instructions. Defendant excepted. *Held,* the above remarks, if oral, were not "instructions" upon the law applicable to the facts of this case.

9. The above entry "defendant excepted" applies only to giving the charge and special instructions, and besides, is void as "broadside."

10. The use of the word "plausible" was not excepted to and if it had been, the inadvertence, if any, was cured by the full, correct and explicit charge which was thereafter repeated.

11. The charge of the court on the question of fraudulent intent is correct within the ruling in State v. McDonald, 133 N. C., 690, which was more lenient to the defendant than it would have been had the bill been drawn as authorized by the amendment (Laws 1889, chapter 226,) to section 1014.

STATE *v.* DEWEY.

12. The appellant's "statement of case on appeal" should not have been sent up by the clerk below, nor have been docketed as part of the transcript here.

HOKE, J., dissenting.

INDICTMENT for embezzlement against T. W. Dewey, heard by *Judge E. B. Jones* and a jury, at the July Term, 1905, of the Superior Court of CRAVEN County. From a conviction and the sentence of the court, the defendant appealed.

W. W. Clark, D. L. Ward and *O. H. Guion,* with *Robert D. Gilmer, Attorney-General,* for the State.

Aycock & Daniels, F. I. Osborne, A. D. Ward and *P. M. Pearsall* for the defendant.

CLARK, C. J. The defendant, indicted for embezzlement, applied to the solicitor for a "Bill of Particulars," who replied that all the information he could give was contained in the books of the Merchants' Bank of New Bern, of which he was advised the defendant and his counsel had made a full and complete examination. The defendant then applied to the judge at the succeeding term (April, 1905), who, upon the hearing of the motion, declined the same and the defendant appealed.

Such refusal is not appealable except possibly in a case of gross abuse of discretion. *State v. Brady,* 107 N. C., 826, 827; *State v. Bryant,* 111 N. C., 695; *Townsend v. Williams,* 117 N. C., 337; *Gold Brick Case,* 129 N. C., 657. In 1 Bishop New Criminal Procedure, sec. 643, it is said: "The application for a bill of particulars is addressed solely to the judicial discretion; hence his decision thereon is not open to revision by a higher tribunal." *Com. v. Wood,* 70 Mass., 11. To the same purport, *State v. Nagle,* 14 R. I., 333, citing *Com. v. Giles,* 1 Gray, 466; *Chaffee v. Soldan,* 5 Mich., 242; *Com. v. Wood, supra; State v. Hood,* 51 Me., 363. In *People v.*

McKinney, 10 Mich., 53, which was an indictment of the State Treasurer for embezzlement, the court fully discusses the practice and says that while bills of particulars should be freely allowed, especially in indictments for embezzlement, the granting of such orders is in the discretion of the trial judge and not reviewable, except possibly when there is a palpable and gross abuse of such discretion. *State v. Van Pelt,* 136 N. C., 633, in no wise controverts this practice, which is uniform in all jurisdictions, but merely holds that a defective indictment cannot be cured by the bill of particulars, and, that when the latter is furnished, the State is restricted in its proof "to the items therein set down."

If an appeal was permissible, it was premature. The defendant should have noted his exception and if the final judgment was against him, he could have had the refusal reviewed on appeal therefrom with the other errors assigned, whereas if the final judgment were in his favor, the appeal from the refusal of the order would be useless. The courts will not permit the needless delays and expense which would result from entertaining fragmentary and premature appeals, but will disallow all such appeals. *Hines v. Hines,* 84 N. C., 125; *Guilford v. Ga. Co.,* 109 N. C., 312, and other cases collected in Clark's Code (3d Ed.), pp. 740, 743. Besides, the appeal is now useless, for the motion for a "Bill of Particulars" being a discretionary matter and its refusal not *res judicata,* the motion was renewed at the July Term and was granted, and the defendant had the benefit of the bill of particulars before his trial at said term.

This case came on for trial at July Term, 1905, of Craven Superior Court. The defendant's motion for a continuance at April Term was granted. At July Term he again moved for a continuance because of the above mentioned appeal from the refusal of the motion for a bill of particulars. Such appeal, as we have seen, did not lie, and the court besides, at that time, allowed the bill of particulars, which was all

that the defendant could have obtained if this court had entertained the appeal and held with the defendant. It is only when the judgment is final and disposes of the entire controversy that an appeal transfers the cause to the appellate court and disables the court below from proceeding therein. *Guilford v. Ga. Co., supra; Green v. Griffin*, 95 N. C., 50; *Carleton v. Byers*, 71 N. C., 331; *Isler v. Brown*, 69 N. C., 125. The case being in the lower court, the granting or refusal of a continuance is a matter necessarily in the discretion of the trial judge and not reviewable, certainly in the absence of gross abuse of such discretion. *Slingluff v. Hall*, 124 N. C., 397; *Bank v. Mfg. Co.*, 108 N. C., 282; *Dupree v. Ins. Co.*, 92 N. C., 417; *Gay v. Brookshire*, 82 N. C., 411; *State v. Scott*, 80 N. C., 365; *State v. Lindsey*, 78 N. C., 499; *Moore v. Dickson*, 74 N. C., 423; *Austin v. Clarke*, 70 N. C., 458, and citations thereto in the Annotated Edition.

The court was requested to put its instructions to the jury in writing. "Before reading the written charge to the jury the court stated orally that this was an important matter to the defendant and the State, and in arriving at a verdict they must not be governed or swayed by sympathy, prejudice or passion, but render such a verdict as is warranted by the evidence." There is nothing prejudicial to the defendant in this. Nor was it in violation of section 414 of The Code, which requires a judge, when requested in apt time, to put his instructions to the jury in writing. The word "instructions" as there used relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts (which is their sole province), in shaping their responses to the issues submitted to them. *Lowe v. Elliott*, 107 N. C., 718; *Drake v. Connelly, Ibid.*, 463; *Dupree v. Ins. Co.*, 92 N. C., 417.

In *Currie v. Clark*, 90 N. C., 361, *Smith, C. J.*, says: "It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid

any and all oral expressions from the presiding judge. This would be to subordinate substance to form and subserve no useful purpose * * * The instructions to be written and read are such as expound the law and are reviewable on appeal." In *Jenkins v. Railroad,* 110 N. C., 442, it is said: "The defendant had a right to insist on the entire charge *as to the law* being put in writing," and the reason there given is "that in the event it should be handed to the jury on their retirement (Laws 1885, chap. 137,) or to avoid differences between counsel in making up the case on appeal." In the more recent case of *State v. Crowell,* 116 N. C., 1058, the above excerpt from *Smith, C. J.,* in *Currie v. Clark,* is cited and approved. 2 Thompson on Trials, sec. 2380, says that "directions which are deemed instructions within the meaning of such a statute (similar to our Code, section 414,) are *statements of rules of law* governing the matter in issue."

After the jury had been out some time, they returned into court and one of them said they could not agree. The court then told them that "he could be of no aid to them upon the facts; that they were the sole triers of the facts. If it was upon a point of law, he would be glad to aid them. But upon the facts they must decide, and further stated it was the duty of a jury to reconcile the testimony where there was a conflict, if they could, and if they could not reconcile the testimony, then it became their duty to adopt the most plausible theory of the evidence in arriving at a verdict. The jury then retired and the counsel for defendant called the attention of the court to what the defendant claimed was an error in leaving out the question of reasonable doubt and fraudulent intent. The court immediately called the jury back and restated to them what he had just told them, and further stated that the State must satisfy them beyond a reasonable doubt of the fraudulent intent at the time of appropriating the funds, if you find he did appropriate the funds. The court then read the second time his charge and

the special instructions of the defendant. Defendant excepted." It does not appear that the judge's remarks were oral, but if so they were not instructions upon the law applicable to the facts of this case, but merely general observations as to the province of the court and jury as to finding facts. The defendant made no objection on that ground, nor to the use of the word "plausible," and it is fair to assume that the judge would have corrected that if the defendant had thought it prejudicial and objected, for the judge called the jury back and corrected his charge in the only particular specified. The judge not only charged as asked, but he again gave the special instructions, asked by defendant, previously given, among them these: "Unless the jury is satisfied beyond a reasonable doubt that at the very moment of conversion the defendant had a fraudulent and felonious intent, they will find the defendant not guilty;" and further: "A reasonable doubt of guilt may arise from a want of evidence." He then repeated his charge in full (which is entirely correct). The entry thereupon, "defendant excepted," applies only to giving the charge and special instructions, and besides is void as "broadside." If the use of the word "plausible" was not happy, it was certainly not excepted to; and if it had been, the inadvertence, if any, was amply cured by the full, correct and explicit charge which was thereafter repeated. *State v. McNair,* 93 N. C., 631; *State v. Keen,* 95 N. C., 648.

After a full and careful consideration of all the exceptions (some of which were taken only "out of abundant caution" and need not be noticed) we find nothing prejudicial to the defendant entitling him to another trial. He was cashier of the bank. He was more familiar than any one else with the books which were relied on to show his changes and false entries therein and his embezzlements. He and his able counsel had full access to them in preparing his defense, and it was further in evidence that he fled the State and was absent many months, and that while so absent he

wrote a letter seeking to compromise matters and escape criminal punishment, in which he fully admitted his guilt.

In *State v. McDonald,* 133 N. C., 680, the court was not inadvertent to chapter 226, Laws 1889, which amended section 1014 of The Code by inserting after "fraudulently" in the fourth and sixth lines thereof, the words "or knowingly and willingly misapply or," but the bill of indictment in that case was drawn solely under section 1014 as it was before amended, and did not contain the charge authorized by the aforesaid Act of 1889. The charge of the court in this case is correct within the ruling in *McDonald's case,* which was more lenient to the defendant than it would have been had the bill been drawn as authorized by the amendment of 1889.

We cannot pass over the irregularity in sending up the appellant's "statement of case on appeal." This has no proper place in the record and we cannot consider it. It should not have been sent up by the clerk below, nor have been docketed as part of the transcript here. The statute governs such matters. It provides that when the parties cannot agree upon a case on appeal, the judge "settles" the case on appeal, and that is the only "case" the appellate court can consider. It is true that the appellant can file his exceptions to the charge in ten days after court and is entitled to have them sent up, though if such exceptions embody recitals of fact, the court, as to that, will be controlled by the judge's statement of facts. If such exceptions to the charge are refused by the judge, the appellant can have them brought up by *certiorari. Lowe v. Elliott, supra.* But the practice here attempted of sending up the "appellant's statement of case" to contradict the judge, is contrary to the statute and would lead to endless confusion. It cannot be entertained.

No Error.

HOKE, J., dissenting: I differ from the court in its de-

cision of this case and am of opinion that the defendant has not had his cause tried in accordance with law.

The defendant in apt time and in proper manner requested the court below to put its instructions to the jury in writing, and where this is done the statute provides that the judge shall put his instructions in writing and read them to the jury as written, and sign and file the same as a part of the record in the cause. Code, sec. 414.

The facts which transpired on the trial in respect to this request of the defendant are embodied in the case on appeal as follows: The judge at first put his charge in writing and read it to the jury, and the written charge seems to be free from error. The case on appeal then proceeds as follows: "After the conclusion of the charge and after the jury had been out some time, they returned into court and one of them stated they could not agree. The court stated he could be of no aid as to the facts; that they were the sole triers of the facts; if it was upon a point of law he would be glad to aid them, but upon the facts they must decide, and further stated it was the duty of a jury to reconcile the testimony where there was a conflict, and if they could not reconcile the testimony then it became their duty to adopt the most plausible theory of the evidence in arriving at a verdict. The jury then retired and counsel for the defendant called the attention of the court to what defendant claimed was an error in leaving out the question of reasonable doubt and fraudulent intent. The court immediately called the jury back and restated to them what he had just told them, and further stated that the State must satisfy them beyond a reasonable doubt of the fraudulent intent at the time of appropriating the funds, if you find he did appropriate the funds. The court then read the second time his charge and the special instructions of defendant." Defendant excepted.

Here the judge laid down orally an erroneous proposition

as to how the jury should weigh the evidence and reach a conclusion.

The jury having again retired and the error being called to his attention, His Honor recalled the jury and restated the erroneous proposition and then added: "The State must satisfy the jury beyond a reasonable doubt of the fraudulent intent at the time of appropriating the funds, if you find he did appropriate them." The judge below then again read his written charge to the jury. This erroneous proposition was nowhere in terms withdrawn from the jury. We have it then that the judge twice told the jury orally that it was their duty to reconcile the evidence if they could, and if they could not, it was their duty to adopt the most plausible theory of the evidence in arriving at a verdict. In other words, to convict the defendant, if that was the most plausible conclusion. And twice he tells them that the State must satisfy them beyond a reasonable doubt; once in the written charge, and once orally. To which direction did the jury give the most heed and what rule has guided them to the conclusion which they reached? In my judgment unless expressly withdrawn this would amount to a reversible error if the entire deliverance of His Honor had been in writing. The counsel for the defendant differ from His Honor as to what he did say in his spoken charge, but this is really of no moment on the question now considered, nor is it important whether the oral part of the charge was erroneous or not. The case declares that instructions embodying legal propositions have been twice spoken to the jury, and nowhere expressly withdrawn, when the law requires that the entire charge shall be put in writing.

North Carolina has been extremely fortunate in having Superior Court judges who are capable, learned and impartial; but we know that there have been and may be again, occasions and instances where the due enforcement of this statute was the only guaranty that a citizen had that his prop-

erty, liberty, life and character would be dealt with in accordance with the law of the land. It is to my mind of vital importance in the due administration of justice, and its provisions should be in no wise disregarded or ignored. The proposition here stated will find support in *Currie v. Clark,* 90 N. C., 355; *State v. Young,* 111 N. C., 715; *Wheatley v. West,* 61 Ga., 461; Thompson on Trials, sec. 2375-2377.

In *Currie v. Clark, supra,* it is said: "Moreover that statutory mandate positively forbids any verbal explanatory comments which may affect or modify the written language and tend to mislead the jury as to its purport or aim. The propositions embodied in the writing must stand in their assumed form, not added to or diminished by any contemporary and extraneous words falling from the lips of the judge. The jury must gather the meaning of the instructions solely from the written words in which they are conveyed, as must the revising court in passing upon their correctness in law."

In *State v. Young, supra,* it is held that "at the request of counsel made in apt time, the court must put its entire charge to the jury in writing, and it is error to charge them orally upon any point when they return into court for instructions."

The only decision which I can find that tends to support a contrary view is *State v. Crowell,* 116 N. C., 1052, and this is more apparent than real. In *Crowell's case* the judge had put his charge in writing and read the same to the jury as the statute requires. The defendant had preferred a prayer for instructions that the case was barred by the statute of limitations. This prayer was refused, the judge saying to the jury that "the statute of limitations has nothing to do with the case." It was simply a refusal to submit an instruction preferred in writing by which the defendant got the benefit of an exception, and was in no wise given so that it could in any way influence the verdict, which was rendered on the facts submitted for the jury's consideration. It is answered that this objection is not open to the defendant be-

cause no exception was taken, but I do not so understand the record. The very feature of the trial to which this objection is urged is set out in the case on appeal and exception duly noted.

I am of opinion that the statute which should govern cases of this kind has not been complied with, and that the defendant is entitled to a new trial.

STATE v. LUCAS.

(Filed October 3, 1905).

Justices of the Peace—Jurisdiction—New Trial—Former Conviction—Indictment.

1. Where a justice of the peace heard a warrant charging the defendant with an assault, with serious damage, and adjudged that the accused give bond for his appearance and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased and his attempt to reverse his decision the next day and fine the defendant was a nullity.

2. There is no authority given to a justice of the peace to grant a new trial in a criminal case after he has made a final disposition of it.

3. The justice having no jurisdiction to try and convict the defendant after he had bound him to court, a plea of former conviction in the Superior Court was properly overruled, where the indictment alleged that there was serious damage, though the jury convicted of a simple assault merely.

INDICTMENT against J. H. Lucas, heard by *Judge O. H. Allen* and a jury, at the February Term, 1905, of Superior Court of SAMPSON County.

Defendant was indicted for assault with serious damage and pleaded former conviction and not guilty. The evi-

dence upon the former plea was that a warrant was issued by a justice of the peace charging defendant with an assault and battery on D. C. Bullard, resulting in serious injury. At the trial, the justice found that there was probable cause and required defendant to give bond for his appearance at the next term of the Superior Court. The bond was duly executed and accepted by the justice and the defendant discharged, all witnesses having been recognized for their appearance at court. No entry of these proceedings having been made on his docket, the justice, on the next day after the trial, concluded that he had made a mistake, reversed his decision and rendered judgment against defendant for a fine of $1 and costs. No one but the justice was present when this was done. Defendant, being notified of the judgment, appeared and paid the fine and costs, and the justice surrendered to him the appearance bond he had given. No papers were returned to the Superior Court as required by the statute. The witnesses appeared at court as they were recognized to do, and this bill of indictment was sent to the grand jury and returned "a true bill." The assault with serious damage was sufficiently charged in the indictment. Upon the foregoing facts the court adjudged that the plea had not been sustained as the judgment of the justice was a nullity. The case was then tried upon the plea of not guilty and the defendant was convicted of a simple assault. Defendant's counsel moved for his discharge upon the ground that the court erred in holding that there had been no former conviction. Motion denied. Judgment upon the verdict. Defendant excepted and appealed.

Robert D. Gilmer, Attorney-General, for the State.
F. R. Cooper for the defendant.

WALKER, J., after stating the case: The motion to discharge the defendant should not have been sustained. If the

ruling of the court was wrong, on the plea of former conviction, the defendant was not entitled to a discharge but to a new trial. But we will treat the motion as if it had been for a new trial, as perhaps it was so intended.

The ruling of the court that the judgment of the justice was void, as he had no jurisdiction of the case after he had bound the defendant to court and taken his recognizance, was manifestly correct. The statute requires that when the justice has no final jurisdiction of the offense "he shall desist from any final determination" of the matter, and either commit the accused to prison or require from him a recognizance for his appearance at the next term of the court to answer the charge, and he shall then bind the complainants and witnesses for the State to appear in like manner and testify. He must then return the papers, with a statement of his proceedings, to the clerk of the court on or before the first day of the term. Code, secs. 896, 1152, 1156, 1157. This is plain language and its meaning is unmistakable. It was intended most surely that when the justice had fully performed the duties required of him, his jurisdiction as to the case should be at an end. If he makes a mistake, it must be corrected elsewhere—not in his court. There is no provision of the statute, nor is there any in the general law, for correction of his errors by himself after he has given his decision and taken security for the appearance of the accused. To permit a justice, after an investigation and decision by himself and after the discharge of the defendant and the witnesses, all of whom have been recognized for their appearance at court, to reverse his decision the next day in the absence of the prosecutor, the witnesses and the defendant, would be pernicious practice and tend to great confusion in judicial proceedings, apart from other considerations arising from the express provisions of the statute prescribing the jurisdiction of justices of the peace and impliedly forbidding any such proceeding. It would open the

door wide to fraudulent and collusive prosecutions, pervert the course of justice and defeat the very purpose which the orderly method of procedure provided by the statute was intended to subserve.

We are therefore of the opinion that when the justice had heard the cause and adjudged that the accused give bond for his appearance, and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased. The case had then passed beyond his control and he could not reverse or change his decision or take any other steps in the cause, except to return the recognizance and the papers, together with a statement of his proceedings, to the clerk of the court in obedience to the statute. There is no authority given to a justice to grant a new trial in a criminal case after he has made a final disposition of it. If he can reverse his judgment the day after it is given, he can do so the next week, month or year. What the justice did the day after the trial was therefore *coram non judice,* and his former decision of the case was in no manner avoided or affected thereby. The case then stood as if there had been no subsequent proceedings. The views we have expressed are fully sustained by *Steel v. Williams,* 13 Ind., 73, a case directly in point, in which the very question herein presented is fully and ably discussed. Indeed, the authorities upon the subject seem to be all one way, the judges and text writers having spoken with one voice upon the subject. Bishop, in his New Criminal Procedure (4th Ed.), p. 141, section 234, subsection 4, says: "The magistrate, on determining to send the prisoner to the higher court, commits him and the witnesses, or takes their several recognizances, as the case may require. Then, and in the absence of any special statute, his functions in the case cease." He is in a certain sense *functus officio.* Having fulfilled the particular functions conferred by statute, he is consequently without further official authority in the case. So in *Sandrock v. Knop,* 34

How. Pr. (N. Y.), 191, a case substantially identical in its facts with this one, the defendant was arrested and tried by the committing magistrate, a police justice, who required him to enter into a recognizance for his appearance. Afterwards, the justice proceeded to re-examine the case. He discharged the defendant and then ordered the appearance bond to be cancelled. It was held that the giving of the recognizance by the accused had the effect to divest the justice of all authority further to examine into the complaint, and that any further proceedings in the investigation of the alleged offense must be had at the general sessions to which court the defendant had been bound to appear, and before the grand jury. The subsequent proceedings were therefore held to be a nullity. More like our case in all respects than any other we have been able to find, is *State v. Mouseley,* 4 Harr. (Del.), 553, which was an indictment for assault. The accused was first bound to court by the justice who afterwards, with the consent of the prosecutor, allowed the matter to be settled on payment of costs. This was held to be beyond his jurisdiction and an unauthorized proceeding, and it was distinctly ruled that, when the committing magistrate holds the accused to bail or commits him for refusal to give bail for his appearance, there is no appeal from the justice and no authority anywhere to review his decision on this question, nor to prevent the case from going before the court after once there has been a judgment that it is a case which ought to be tried there. In *State v. Russell,* 24 Texas, 505, it was held that, after taking a bail-bond and the adjournment of his court, a magistrate has no authority to take further action in the case, as the jurisdiction of it is in the court to which the defendant has been bound for his appearance. The court held in *Nelson v. People,* 38 Mich., 618 (opinion by *Cooley, J.*), that holding an accused person for trial in the circuit court "undoubtedly" gave that court jurisdiction of the case. It was held in *State v. Randolph,* 26 Mo., 213,

that after the justice had issued his warrant of commitment to the sheriff, he could not recall it and take a recognizance, unless expressly empowered by statute so to do, as his authority was exhausted, and the defendant can be discharged only by *habeas corpus*. Our statute makes such provision (Code, sec. 1161), that is, that a justice or judge may take the recognizance. In our case the justice had already taken the bond. The case cited serves to illustrate the principle and to prove its general adoption in all systems of judicial procedure. *State v. Young*, 56 Me., 219, presented a peculiar application of the rule. It was there held that the recognizance returned to court might be amended so as to speak the truth, being a record, but that as, when amended, it showed the justice had taken it after once committing the defendant, it was void, as he was without authority to act in the matter or to supersede the further execution of the *mittimus*—his jurisdiction having been fully exercised and ended, when the officer received the defendant and departed with him from the court. But for our statute, to which we have referred, this would be the law here. The principle of the decision is still the law with us. In this case, the justice recognized the accused and then his jurisdiction ended. There was nothing more for him to do, or that he could do under the statute, as his jurisdiction in this respect is derived solely from the statute and must be exercised in accordance therewith. *State v. Jones*, 100 N. C., 438. We might cite numerous other cases to the same effect as those mentioned above, but it would be useless to do so, as those cited will suffice to show that the general current of authority has always strongly set in one and the same direction. Suppose the justice had originally assumed final jurisdiction which he possessed and fined the defendant, could he the next day or the next week have set aside the judgment, renounced his final jurisdiction and recognized the defendant to appear at the next term of the court? Certainly he could not. So plain a proposition

does not admit of argument. So it must be, in either case, that when he has fully exercised his jurisdiction he has reached the limit beyond which he cannot go, nor can he retrace his steps.

If the justice had taken final jurisdiction when the case was first heard by him and disposed of it, the plea of former conviction would have been a complete bar to the prosecution in the Superior Court, as the jury by their verdict found that there was no serious damage done. *State v. Albertson,* 113 N. C., 633; *State v. Price,* 111 N. C., 703. But as the justice had no jurisdiction to try and convict the defendant after he had bound him to court, and as the indictment alleged that there was serious damage, though the jury convicted of a simple assault merely, the plea was bad and was properly overruled by the court. As the Superior Court had jurisdiction of the case by reason of the form of indictment, it proceeded rightly to pronounce judgment upon the verdict. *State v. Ray,* 89 N. C., 587; *State v. Ernest,* 98 N. C., 740; *State v. Fritz,* 133 N. C., 725.

There is no direct authority to be found in the decisions of this court upon the question discussed. The general observations made in *State v. Moore,* 136 N. C., 581, will be found to have an indirect bearing upon the matter. The second, or rather the pretended trial, did not have the true form of a judicial investigation or inquiry, nor even its semblance. What is said in that case is therefore applicable to this one. We again call the attention of the justices of the peace to the suggestions made in *State v. Moore,* and to the necessity of carefully observing the directions of the statute, and now, we add, of keeping strictly within the bounds of the jurisdiction thereby conferred. Departures from the beaten path, if permitted, will open a way by which criminals may escape merited punishment with impunity. *State v. Jones, supra.*

The record discloses no error committed in the trial below.

No Error.

STATE v. SUTTON.

(Filed October 17, 1905).

Fish and Fisheries — Mill Seat — Construction of Criminal Statutes.

1. Under Chapter 824, Laws 1905, which provides that "it shall be unlawful for any person to hedge or fish with traps in the waters of Bear Creek between the mouth of said creek where it empties into Neuse River and the Joyner mill-seat," the defendant is prohibited from setting hedges in ditches 15 or 20 yards below the mill house, though he owns the mill house and the land for 75 yards below the mill, as "mill-seat" designates a well defined landmark—the dam and mill—and not the extent of the mill owner's territorial possession in the vicinity.

2. Under this statute, the defendant is not prohibited from setting hedges on the sheeting of the mill, under the roof of his mill house and catching fish coming out of the pond, but he cannot interfere by such hedges with those which come up from the mouth of Bear Creek till stopped at the dam and mill-seat.

3. A "mill-seat" means the mill house, dam and appurtenances used for operating the mill by water power, and the ground upon which they stand.

4. The right of the General Assembly to regulate fisheries, even on private property, is settled.

5. The rule that criminal statutes are to be strictly construed, applies when the scope of the act is doubtful and does not mean that a word is to be given a different meaning in a criminal action from that which would be given it in a civil proceeding.

CONNOR and HOKE, JJ., dissenting.

INDICTMENT under chapter 824 of the Acts of 1905, against A. R. Sutton, heard by *Judge W. B. Councill* and a jury, at the August Term, 1905, of the Superior Court of LENOIR County. From a judgment of guilty upon a special verdict, the defendant appealed.

STATE *v.* SUTTON.

Robert D. Gilmer, Attorney-General, for the State.
Y. T. Ormond and *Aycock & Daniels* for the defendant.

CLARK, C. J. This action was begun before a justice of the peace, and on appeal the defendant was again convicted in the Superior Court for a violation of chapter 824, Laws 1905, which provides: "It shall be unlawful for any person to hedge, or fish with traps in the waters of Bear Creek between the mouth of said creek where it empties into Neuse River and the Joyner mill seat in Lenoir County."

The word "mill-seat" is synonymous with mill-site and means "where the mill sits." *Miller v. Ins. Co.,* 7 Fed. Rep., 651. In *Curtis v. Smith,* 35 Conn., 158, it is said: "A mill site comprehends not only the site of the mill building, but also the water power connected therewith for milling purposes." The grant of a mill site conveys by implication the water power and the right to maintain a dam for the beneficial appropriation of the water. *Stackpole v. Curtis,* 32 Me., 383; *Ring v. Walker,* 87 Me., 550. In *Occum Co. v. Mfg. Co.,* 35 Conn., 512, it is said: "A mill site is the same as a mill privilege which, in *Gould v. Duck Co.,* 13 Gray (Mass.), 442, was said "to embrace the right which the law gives the owner to erect a mill thereon, and to hold up or let out the water at the will of the occupant for the purpose of operating the same in a reasonable manner." 20 A. & E. Enc. (2nd Ed.), 675; *Crosby v. Bradbury,* 20 Me., 65; *Burr v. Mills,* 21 Wend., 294.

A "mill seat" means the mill house, dam, and appurtenances used for operating the mill by water power, and the ground upon which they stand. The evident purpose of the General Assembly in this statute was to keep the waters of Bear Creek free from hedges or traps, so that fish might run up the same as far as the obstruction caused by the dam and water power at Joyner's mill, beyond which they could not go. The right to regulate fisheries, even on private property,

is settled beyond controversy, 2 Farnham on Waters, sections 381, 382; *Collins v. Benbury*, 25 N. C., 277; *State v. Gallop*, 126 N. C., 983, and cases there cited, and in 13 A. & E. Enc. (2nd Ed.), 573, 576, 579, and notes; *State v. Bridgers*, 142 Ill., 41; *State v. Roberts*, 59 N. H., 484; *Howes v. Grush*, 131 Mass., 207.

This case turns upon the meaning of the word "mill seat" which is to be taken in its ordinary and usual signification, which is necessarily the same in both criminal and civil proceedings. The rule that criminal statutes are to be strictly construed applies when the scope of the act is doubtful, and does not mean that a word is to be given a different meaning in a criminal action from that which would be given it in a civil proceeding. Words are used by the law-making power to express, not to conceal, its meaning, and hence are to be taken as ordinarily understood, alike in criminal and civil actions.

It is stated in the case on appeal that "many years ago, the original conveyance of this mill property conveyed about 20 acres of land for a mill seat, and that the property conveyed to the defendant includes about 20 acres of land, and extends about 75 yards below the mouths of the ditches," which were "15 or 20 yards below the mill house," and on both sides of the mill race. In these ditches and also on the sheeting of the mill, under the roof of the mill house, the defendant set wire fences or hedges, and caught fish. The latter were on the "mill seat" or site, as we understand and define the word, and defendant was authorized so to do. He is not prohibited to catch in this manner fish coming out of the pond, but he cannot interfere by such hedge with those which could come up from the mouth of Bear Creek till stopped at the dam and mill seat.

It is further contended, however, by the defendant that the hedges set "15 or 20 yards below the mill house" were lawful because the owner of the mill house also owned the land for

75 yards below the mill. Suppose he had owned a tract of 2,000 acres or 20,000 around the mill, would his privileges under this act have been any greater than those of a man who owned only the "mill seat" itself? He had no inherent right of fishing in Bear Creek. That was a sovereign right of the State to be permitted or denied at the will of the sovereign, speaking, in the only way in which it could make known its will, through the law-making power. In forbidding the monopoly of fishing by hedges and traps and leaving fishing free to all, on Bear Creek, from its mouth to Joyner's mill seat, the Legislature was thinking of the unobstructed part of the creek up to Joyner's mill house and dam, and was regardless of the extent of dry land along the creek, between those points which might be owned by the owner of the "mill seat." By "mill seat" it intended to designate a well defined landmark, which all men may know—the dam and mill—and not the extent of the mill owner's territorial possessions in the vicinity.

The original deed seems merely to have conveyed 20 acres that a mill seat might be located somewhere upon it. The deed to the present owner does not seem, from the case on appeal, to contain even that provision. But if the deed to the defendant had conveyed 20 acres, or 20,000 acres, and described such tract as a "mill seat" this provision in a deed would not change the meaning of a word of common usage and well defined significance when used in a statute. It would not make a whole body of land a mill site, or seat, because there was a mill run by water power somewhere within its boundaries. The setting the wire fences or traps, and taking fish therefrom "15 or 20 yards below the mill house," being "between the mouth of Bear Creek" and the "mill seat," the court properly adjudged the defendant guilty upon the special verdict. Though these ditches are filled with water and hence have fish only in overflows from the pond, the waters are part of "the waters of Bear Creek," and when

they go back into the main run, the fish in them are not to be restrained and caught by forbidden hedges and nets. The owner of the mill has no rights over either the water, or the fish therein, after they have gone by the wheel or dam. "The mill will not grind again with the water that has passed."

From the amount of the fine imposed—$5—we presume that this was merely a test case, to decide upon the defendant's right of catching fish by hedges or traps, which right under the statute does not extend lower down than catching them in that mode, on the sheeting, or at any other spot on the mill site, as they come down out of the pond, through the forebay or over the dam. Below that the waters of Bear Creek are free from such inventions, and

"May roll unvexed to the sea."

Affirmed.

CONNOR, J., dissenting: I cannot concur in the reasoning or the conclusion reached by the court in this case. I do not question the power of the Legislature to regulate the time, manner and place of fishing in public waters. I do not think that the right to do so in private waters is so absolute as the language of the opinion would seem to indicate. The question was so fully and satisfactorily discussed and settled by this court in *State v. Glen*, 52 N. C., 321, and *Cornelius v. Glen*, 52 N. C., 512, that I could not hope to add to it anything of value or interest. It is quite clear that the court did not recognize any power to interfere with the right of the owner of the bed of the stream, to the use of it except in the exercise of the right of eminent domain, subject to its limitations. In *State v. Pool*, 74 N. C., 402, the question of the power of the State to make the obstruction of non-navigable streams by the owner of the bed indictable, was fully considered and denied. *Mr. Justice Bynum* cites with approval the language used by the court in the *Glen cases*, concluding with the words: "Whether the State can enforce against the

owner of the land and bed of an unnavigable creek, an act of the Legislature forbidding its obstruction to the passage of fish, is a question not raised upon this indictment and verdict and need not be discussed. *Mr. Justice Rodman* was joined by *Mr. Justice Reade* in a strong dissenting opinion reported in 75 N. C., 597. The doctrine upon which the decision of the *Glen cases* was decided was denied in the dissenting opinion. I do not think the question is raised in *State v. Gallop,* 126 N. C., 983. That case is well decided—but there was no point presented in regard to the rights of the owners of the bed of the stream. I do not wish to do more than notice the question and say that I think the power to enforce statutes of this kind has its limitations. I note that at the same session at which the act in question was passed similar statutes prohibiting fishing by nets, etc., in mill ponds, without any regard to their connection with navigable streams, were enacted. I cannot think that the power extends to the owners of private fish ponds, or even public mill ponds, having no outlet into navigable waters. The extent to which the owner of property may be interfered with in its use, without compensation, to serve a public interest is a serious question to be approached and dealt with carefully. I do not care to be committed to any general statement of the law without the most careful consideration. My dissent in this case is based upon my objection to the construction of the statute. This is a public statute of local application and should be construed in the light of the local conditions. Some force must be given to the term, "The Joyner Mill Seat." If the draughtsman had intended to prohibit the putting of traps below the mill, using the term as meaning the mill house or the dam, he would have said so. Statutes of this kind are usually drawn by those interested in extending the prohibition as far as possible and should be so construed that the private right of the citizen be interfered with no further than the unmistakable language demands.

It is to be noted that the prohibition is between "The Joyner Mill Seat," etc. This indicates that the land covered by the water of the "Joyner Mill Seat" was known to the draughtsman. Can there be any question that if the owner were to convey or devise "The Joyner Mill Seat," the description would carry the land originally conveyed for the mill seat and not be restricted to the spot upon which the dam or the house was situate. "The grant of a mill site conveys a water power together with the right to maintain a dam whenever such dam would be suitable for the convenient and beneficial appropriation of the water power." *Stackpole v. Curtis,* 32 Me., 383. "A grant of land bounding on or near a pond and stream, reserving the mill and water privilege, is a reservation of the right of flowing the land so far as necessary or convenient, or so far as it has been usual to flow it, for that purpose." *Pettee v. Hawes,* 30 Mass., 323. "A mill site comprehends, not only the site of the mill-building, but also the water power connected therewith for milling purposes." *Curtiss v. Smith,* 35 Conn., 156; *Tabor v. Bradley,* 18 N. Y., 109. "By a devise of a mill with the appurtenances, it has been held that a right not only to the building and use of the water, but also to the land which was used with the mill passed." *Blaine v. Chalmers,* 1 Sergt. & R., 169; Angell on Water Courses, 274. It is a matter of common knowledge that the value of a mill site is dependent upon the right to carry the water away as essentially as the right to hold it back. The "mill tail" is as much a part of the "site" as the "mill pond." The suggestion that a man might claim one or more thousand acres as his "mill site" does not impress me as shedding much light upon the question. A man will hardly buy and pay for a large quantity of land for which he has no possible use and which can serve no valuable purpose. In the decision of causes, we must deal with the facts as found by the jury. Here the person who erected this mill understood what quantity

of land with the privilege incident to its ownership was necessary to enable him to establish and maintain his mill; he purchased such quantity for a "mill seat" and the Legislature recognized the existence of this boundary and adopted it as one of the points between which and the mouth of the creek nets should not be set. To fail to give force and effect to this language is, in my opinion, to strike out "mill seat" and to write into the statute the word "mill dam" or "mill house." This would not be allowable if we were construing a will or deed, *Barnes v. Simms,* 40 N. C., 392; certainly it cannot be so to restrict the right of the citizen and make an act criminal otherwise lawful. To my mind it is a violation and dangerous innovation of the elementary rules for construing criminal statutes. If the description of the prohibited points is too indefinite, the statute would for that reason be void. Is it possible that the owner is to be made a criminal and, under our decisions, subject to be put to work upon the public roads for putting his nets in the water upon his own land an inch beyond the eaves of his mill house or over his dam? If the mill house be adopted as the test and it be enlarged or diminished in size, the standard is changed. If the dam be adopted and it be lowered or raised by which its top is drawn up or projected down stream so much as an inch, the same result follows. The deed conveying the land for "The Mill Seat" is certain, fixed and unchangeable. The State certainly owes to the citizen the duty, when it makes the exercise of a purely private right upon his own property, a crime, to inform him with reasonable certainty the limits within which he may enjoy his right for which he has paid his money. If there be more than one standard suggested, that which is certain, fixed and recognized should be adopted, rather than that which is uncertain and subject to change. I, of course, concur in the opinion that the defendant has not violated the statute in placing his nets under his mill house. In the light of the

finding by the special verdict that "many years ago the original conveyance of this mill property conveyed about twenty acres of land for a mill seat." I think that the term "The Joyner Mill Seat" used in the statute should be so construed that the prohibition be limited to the lower line of the mill seat. It will be noted that the indictment does not charge, nor does the special verdict find, that the defendant ever caught or obstructed the passage of any fish in his ditches. It is simply found that some twenty yards below the mill house are some ditches on defendant's land, one of which was cut to drain a swamp into the mill tail—the other was cut while the mill was being built to turn the water to prevent its interference with the work. When the water is turned into them "fish can and sometimes do get into said ditches and are prevented from escaping by a wire hedge put by defendant across the ditch." The ditches are in no sense a part of Bear Creek. It does not appear how far they run up into defendant's land. I do not think they are within the words of the statute, nor do I think it competent for the Legislature to prohibit the owner from placing nets or hedges across his own ditch unless doing so constitutes a public nuisance. *State v. Pool, supra.* This is an unwarranted and unreasonable interference with the use of private property. I cannot but think that it will be a startling discovery to the owners of land in the eastern section of the State that every ditch cut upon or through their land into the bordering swamps or creeks are a part thereof, and that they are criminally liable for putting a wire net or driving stakes into them. I cannot see why an act prohibiting the obstruction of the highway may not, by the same liberal canon of construction be held to include private paths connecting with the highway. We may soon find upon the adjournment of some session of the Legislature that a man may not, with safety, walk over his own land or gather flowers which grow upon the side of his path or the

banks of his ditches, without liability to be put upon the public roads as a criminal. While the policy of the State in protecting the propogation of fish should be sustained, the right to the use of private property should not be sacrificed. We are in danger of surrounding our people with a multitude of criminal statutes, many of which are invasions of personal liberty and the use of property which will if not checked convert the people of the whole State into either conscious or unconscious violators of the law. No man may safely do or omit to do such a multitude of acts that the law will become a labyrinth in which he will not walk in safety.

HOKE, J., dissents.

STATE v. MAULTSBY.

(Filed October 17, 1905).

Penalties—Fines—Clear Proceeds—Division of Fine with Informant—Constitutional Law.

1. The Legislature has power to give "penalties," which must be sued for, either wholly or in part to whomsoever shall sue for the same, and only the clear proceeds of such as accrue to the State go to the school fund under the provisions of Art. IX, sec. 5, of the Constitution.

2. Fines, from their very nature, being punishment for violation of the criminal law, are imposed in favor of the State and belonging to the State, the Legislature cannot appropriate their clear proceeds to any other purpose than the school fund.

3. By "clear proceeds" is meant the total sum less only the sheriff's fees for collection, when the fine and costs are not collected in full.

4. The provision in chapter 125, Laws 1903, that the informant "shall receive one-half of the fine imposed" is unconstitutional and there was no error in refusing the petition of the informant for one-half of a fine imposed for selling liquor contrary to its provisions.

THIS is a petition in the action of *State v. W. S. Maultsby,* by one John Evylin, for one-half of a fine imposed upon the defendant Maultsby upon his conviction for retailing spirituous liquors in violation of the Cumberland County prohibition law, heard by *Judge G. S. Ferguson,* at the March Term, 1905, of the Superior Court of CUMBERLAND County. From a refusal of the petition, the informant, Evylin, appealed.

Robert D. Gilmer, Attorney-General, for the State.
N. A. Sinclair and *R. H. Dye* for the informant.

CLARK, C. J. Under the provisions of the Constitution, article IX, sec. 5, the "clear proceeds of all penalties and forfeitures of all fines" are, with other sources of revenue named in said section, appropriated to the school fund. "Penalties" are recoverable by civil action and from time immemorial accrue to the State only when the act creating them so directs. The above section is in the article on "Education," and was not intended as a restriction upon the immemorial legislative power to authorize *qui tam* actions for penalties (and if so intended it would have been placed in article II of the Constitution on the "Legislative Department"), but is merely a provision that the net proceeds of such penalties as accrue to the State shall be devoted to the public schools. This has been fully discussed and settled. *Katzenstein v. R. Co.,* 84 N. C., 688; *Hodge v. R. Co.,* 108 N. C., 30-32; *Sutton v. Phillips,* 116 N. C., 502, and cases there cited and reaffirmed in *Goodwin v. Fertilizer Co.,* 119 N. C., 122; *Carter v. R. Co.,* 126 N. C., 445; *Board*

of Education v. Henderson, Id., 695; *School Directors v Asheville,* 137 N. C., 508.

While it is true that it is competent for the Legislature to give penalties, which must be sued for, either wholly or in part to whomsoever shall sue for the same, and only the clear proceeds of such as accrue to the State go to the school fund, it is otherwise as to "fines." From their very nature, being punishment for violation of the criminal law, they are imposed in favor of the State and belonging to the State, the General Assembly cannot appropriate the clear proceeds of fines to any other purpose than the school fund. By "clear proceeds" is meant the total sum less only the sheriff's fees for collection, when the fine and costs are not collected in full. This also has been fully discussed and settled. *Board of Education v. Henderson,* 126 N. C., 689; *School Directors v. Asheville,* 137 N. C., 508. The distinction is that section 5, article IX, is an appropriation of certain existing sources of revenue, and penalties accrue to the State only when so prescribed, but fines belong to the State in all cases. Hence the Legislature in the act here in question (Laws 1903, chap. 125), under which the judge imposed a fine of $100 for selling whiskey contrary to its provisions, exceeded its powers in section 9 thereof, in providing that the informant "shall receive one-half of the fine imposed." A penalty is always for a sum certain (*Commissioners v. Harris,* 52 N. C., 281; *State v. Crenshaw,* 94 N. C., 877), and is recoverable in a civil action by the party entitled. *Middleton v. Railroad,* 95 N. C., 167; *Burrell v. Hughes,* 116 N. C., 437. A fine is discretionary within the limits prescribed and is paid to the State.

In refusing the petition of the informant for one-half of said fine, there was

No Error.

STATE v. PARKER.

(Filed October 24, 1905).

Statutes, Repeal of—Drinks Containing Alcohol—Intoxicating Liquors—Instructions.

1. Chapter 434, Laws of 1903, making it unlawful to sell any drink *containing alcohol*, is not repealed by chapter 497, Laws 1905, which prohibits the sale of spirituous, vinous or malt liquors or other *intoxicating drinks* and repeals all previous statutes in conflict.

2. In an indictment under chapter 434, Laws 1903, for selling "drinks containing alcohol," an instruction that the drink "must contain some appreciable amount of alcohol—such an amount as a man of ordinary sense, reason and judgment, would say that it had alcohol in it," was not prejudicial to the defendant.

INDICTMENT for selling drinks containing alcohol against J. D. Parker, heard by *Judge Geo. W. Ward* and a jury, at the March Criminal Term, 1905, of the Superior Court of UNION County. From the judgment rendered, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Adams, Jerome & Armfield* for the State.

Redwine & Stack for the defendant.

CLARK, C. J. The defendant was indicted for selling "drinks containing alcohol," contrary to chapter 434, Laws 1903, relating to the sale of liquor in Union County. The defendant moved in arrest of judgment on the ground that chapter 497, Laws 1905, repeals the statute under which the defendant was convicted. The motion was properly denied. Section 1, chapter 434, Laws 1903, makes it unlawful to sell "any spirituous, vinous, malt or other intoxicating liquors, or any drink *containing alcohol,* by whatever name known or

called." Section 13, chapter 497 Laws 1905, prohibits the sale of spirituous, vinous or malt liquors or *other intoxicating drinks,* and repeals all previous statutes in conflict with it. The defendant was indicted, not for selling intoxicating drinks, but for selling drinks containing alcohol, covered by the Act of 1903, which, as far as drinks of this character are concerned, was not repealed by the law of 1905. There is no conflict between the two provisions. They can both stand, for they supplement each other. Not being "irreconcilably inconsistent" the later statute does not repeal the other, by implication. *State v. Biggers,* 108 N. C., 760; *State v. Massey,* 103 N. C., 356; *State v. Witter,* 107 N. C., 792; *Winslow v. Morton,* 118 N. C., 491-2, and cases there cited.

The defendant asked the court to instruct the jury (1) not to consider the evidence in regard to apple cider, (2) that the jury cannot convict unless satisfied beyond a reasonable doubt that the defendant sold the prosecuting witness intoxicating liquors or whiskey drinks, other than apple cider, that would intoxicate. The court refused to so charge, and told the jury that the indictment was under the Act of 1903, for selling "any drink containing alcohol by whatever name known or called," and told the jury that the State must satisfy them beyond a reasonable doubt that the defendant sold Whitley a drink containing alcohol, that "one drop, nor two drops, nor three drops, nor a mere trace would not be sufficient to say that it contained alcohol; nor on the other hand would it be necessary for the drink to contain a sufficient quantity to make one drunk when freely used. The latter would be the test if the defendant were indicted for selling intoxicating liquors. That is not the charge in this case; here he is charged with selling drinks that contained alcohol, under the section read to you, but the drink when sold under this section must contain some appreciable amount of alcohol; such an amount as a man of ordinary sense, reason and judgment, would say that it had alcohol in it."

There was evidence that the defendant sold cider 14 days old, and another variety called chemical cider, and there was evidence that the beverage sold contained alcohol; indeed the witness said it made him drunk, and other witnesses said the same beverage intoxicated them. The defendant cannot complain of the charge. "When the liquid by common knowledge and observation, is intoxicating, the court may so declare, but if it is doubtful whether or not it be so, then the question of fact is raised for the jury." *State v. Scott,* 116 N. C., 1015; *State v. Giersch,* 98 N. C., 720. Upon the same reasoning the court here left it to the jury to find whether the "drinks" sold "contained any alcohol." *Commonwealth v. Reyburg,* 122 Pa. St., 304; *Topeka v. Zufall,* 40 Kan., 47; *State v. Crawley,* 75 Miss., 922.

No Error.

STATE v. HORTON.

(Filed October 24, 1905).

Excusable Homicide—Offense Malum in se—Malum Prohibitum.

1. Where the defendant, while hunting on lands without written permission of the owner, as required by statute, killed the deceased unintentionally, and the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life and negatived all idea of negligence, *held,* that the case is one of excusable homicide, as the offense was *malum prohibitum.*

2. An offense *malum in se* is one which is naturally evil, as murder, theft and the like. Offenses at common law are generally *malum in se.* An offense *malum prohibitum,* on the contrary, is not naturally evil, but becomes so in consequence of being forbidden.

INDICTMENT for manslaughter against W. P. Horton, heard by *Judge W. B. Councill* and a jury, at April Term, 1905, of

the Superior Court of FRANKLIN County. The jury rendered a special verdict, and such verdict and proceedings thereon are as follows:

"That in the month of November, 1904, to-wit: on the—— day thereof, the defendant, W. P. Horton, was hunting turkeys on the lands of another; that the following local statute, enacted by the General Assembly of 1901, was in force at and in the place in which said defendant was hunting, to-wit: chapter 410 of the Laws of 1901; that the said Horton at the time he was so hunting, had not the written consent of the owner of said land, or of his lawful agent; that while so engaged in hunting he killed Charlie Hunt, the deceased, but that said killing was wholly unintentional; that the shooting of the deceased was done while the defendant was under the impression and belief that he was shooting at a wild turkey; that the hunting engaged in by the defendant was not of itself dangerous to human life, nor was he reckless in the manner of hunting or of handling the firearm with which the killing was done; that hunting at that season was not forbidden under the general game law of the State, but was prohibited only by the special statute referred to; that the shooting from which the killing resulted was not done in such grossly careless or negligent manner as to imply any moral turpitude, or to indicate any indifference to the safeguarding of human life; that, but for the said statute herein incorporated, the killing of the deceased by defendant does not constitute any violation of the law. If upon the above findings of fact, the court should be of opinion that the defendant is guilty of manslaughter, we for our verdict find the defendant guilty of manslaughter, but if the court should be of opinion that the defendant is not guilty, we for our verdict find that the defendant is not guilty." Upon this special finding, the court being of opinion that the defendant was guilty of manslaughter, so adjudged and ordered a verdict of guilty of manslaughter to be entered, and gave judgment that the

defendant be imprisoned in the county jail of Franklin, for a period of four months. Defendant excepted to the ruling of the court, and appealed from the judgment against him.

Robert D. Gilmer, Attorney-General, for the State.
F. S. Spruill and *W. H. Ruffin* for the defendant.

HOKE, J., after stating the case: It will be noted that the finding of the jury declares that the act of the defendant was not in itself dangerous to human life, and excludes every element of criminal negligence, and rests the guilt or innocence of the defendant on the fact alone that at the time of the homicide the defendant was hunting on another's land without written permission from the owner. The act which applies only in the counties of Orange, Franklin and Scotland, makes the conduct a misdemeanor, and imposes a punishment on conviction, of not less than five nor more than ten dollars.

The statement sometimes appears in works of approved excellence to the effect that an unintentional homicide is a criminal offense when occasioned by a person engaged at the time in an unlawful act. In nearly every instance, however, will be found the qualification that if the act in question is free from negligence, and not in itself of dangerous tendency, and the criminality must arise, if at all, entirely from the fact that it is unlawful, in such case, the unlawful act must be one that is *malum in se* and not merely *malum prohibitum,* and this we hold to be the correct doctrine. In Foster's Crown Law, it is thus stated at page 258: "In order to bring a case within this description (excusable homicide) the act upon which death ensueth must be lawful. For if the act be unlawful, I mean if it be *malum in se,* the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intent, it will be murder; but if the intent went no further than to commit a bare trespass, it will be

manslaughter." At page 259, the same author puts an instance with his comments thereon as follows: "A shooteth at the poultry of B and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death ensued was *malum in se.* For if it was barely *malum prohibitum,* as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment."

One of these disqualifying statutes here referred to as an instance of *malum prohibitum* was an act passed (13 Richard II, chap. 13,) to prevent certain classes of persons from keeping dogs, nets or engines to destroy game, etc., and the punishment imposed on conviction was one year's imprisonment. There were others imposing a lesser penalty.

Bishop in his work, entitled New Criminal Law, vol. 1, sec. 332, treats of the matter as follows: "In these cases of an unintended evil result, the intent whence the act accidentally sprang must probably be, if specific, to do a thing which is *malum in se* and not merely *malum prohibitum.*" Thus *Archbold* says: "When a man in the execution of one act, by misfortune or chance and not designedly, does another act for which, if he had wilfully committed it, he would be liable to be punished—in that case, if the act he were doing were lawful or merely *malum prohibitum,* he shall not be punishable for the act arising from misfortune or chance, but if it be *malum in se,* it is otherwise. To illustrate: since it is *malum prohibitum,* not *malum in se,* for an unauthorized person to kill game in England contrary to the statutes, if,

in unlawfully shooting at game, he accidently kills a man, it is no more criminal in him than if he were authorized. But, to shoot at another's fowls, wantonly or in sport, an act which is *malum in se,* though a civil trespass, and thereby accidentally to kill a human being is manslaughter. If the intent in the shooting were to commit larceny of the fowls, we have seen that it would be murder." To same effect is *Estelle v. State,* 21 N. J. Law, 182; *Com. v. Adams,* 114 Mass., 323.

An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute. For the reason that acts *mala in se* have, as a rule, become criminal offenses by the course and development of the common law, an impression has sometimes obtained that only acts can be so classified which the common law makes criminal, but this is not at all the test. An act can be, and frequently is, *malum in se,* when it amounts only to a civil trespass, provided it has a malicious element or manifests an evil nature, or wrongful disposition to harm or injure another in his person or property. Bishop Cr. Law, *supra; Com. v. Adams, supra.*

The distinction between the two classes of acts is well stated in 19 Am. & Eng. Enc. (2nd Ed.), at p. 705: "An offense *malum in se* is one which is naturally evil, as murder, theft, and the like. Offenses at common law are generally *malum in se.* An offense *malum prohibitum,* on the contrary, is not naturally an evil, but becomes so in consequence of being forbidden."

We do not hesitate to declare that the offense of the defendant in hunting on the land without written permission of the owner was *malum prohibitum,* and the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life, and negatived all idea of negligence, we hold that the case is one of excusable homicide, and the defendant should be declared not guilty.

We are referred by the Attorney-General to East's Pleas of the Crown, and Hale's Pleas of the Crown, as authorities against this position. We would be slow indeed to hold that the law differed from what these eminent authors declared it to be in their day and time, nor are we required to do so, for a careful examination of their writings will, we think, confirm the views expressed by the court. My Lord Hale does say in volume 1, p. 39, that "If a man do *ex intentione* an unlawful act, tending to the bodily hurt of any person, as by striking or beating him, though he did not intend to kill him, but the death of the party struck, follow thereby within the year and day; or if he strike at one and missing him kill another whom he did not intend, this is felony and homicide, and not casualty or *per infortunium.*" "So it is, if he be doing an unlawful act though not intending bodily harm to any person, as throwing a stone at another's horse, if it hit a person and kill him, this is felony and homicide, and not *per infortunium,* for the act was voluntary, though the event was not intended, and therefore the act itself being unlawful, he is criminally guilty of the consequence that follows."

But this author says in treating of the same subject, at pp. 475, 476: "So if A throws a stone at a bird, and the stone striketh and killeth another to whom he intended no harm, it is *per infortunium,* but if he had thrown the stone to kill the poultry or cattle of B, and the stone hits and kills a bystander, it is manslaughter because the act was unlawful; but not murder because he did not maliciously or with intent to hurt the bystander * * * By the statute of 33 Henry VIII, chap. 6, no person not having lands, etc., of the yearly value of one hundred pounds per annum may keep or shoot a gun, upon pain of forfeiture of ten pounds. Suppose, therefore, such a person, not qualified, shoot with a gun at a bird or at crows, and by mischance it kills a bystander, by the breaking of the gun or some other accident, that in another case would have amounted only to chance-medley, this will be no more

than chance-medley in him; for though the statute prohibits him to keep or shoot a gun, yet the same was but *malum prohibitum,* and that only under a penalty, and will not enhance the effect beyond its nature."

Mr. East, while he gives an instance which apparently supports the view of the State, in treating further on the subject in volume 1, p. 255, says: "Homicide in the prosecution of some act or purpose criminal or unlawful in itself, wherein death ensues collaterally to or beside the principal intent; I say collaterally to or beside the principal intent in order to distinguish this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpose of the mind was destruction to another. And first, it is principally to be observed that if the act on which death ensue be *malum in se,* it will be murder or manslaughter according to the circumstances; if done in the prosecution of a felonious intent, however, the death ensued against or beside the intent of the party, it will be murder; but if the intent went no further than to commit a bare trespass, it will be manslaughter. As where A shoots at the poultry of B, and by accident kills a man; if his intent were to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it were done wantonly and without that intent, it will be barely manslaughter. A whips a horse on which B is riding, whereupon the horse springs out and runs over a child and kills it; this is manslaughter in A and misadventure in B." And again, at page 257: "So if one be doing an unlawful act, though not intending bodily harm to any person, as throwing at another's horse, if it hit a person and kill him, it is manslaughter. Yet in each case it seems that the guilt would rather depend on one or other of these circumstances; either that the act might probably breed danger or that it was done with a mischievous intent."

So we have it, that both Sir Matthew Hale and Mr. East,

to whom we were referred as supporting the claim of guilt, declared that the act must be *malum in se,* and the instances given by them show that these writers had this qualification in mind whenever they state the doctrine in more general terms.

Sir William Blackstone also says in volume 4, pp. 192, 193: "And in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasions it. If it be in prosecution of a felonious intent, or its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will be manslaughter"—citing Foster's Criminal Law. We take it that the distinguished commentator must have intended only such civil trespasses as involve an element *malum in se,* as he cites Foster's Criminal Law, and this author, as we have seen, states the qualification suggested.

Again, we are cited by the State to an instance put by East at p. 269: "But though the weapons be of a dangerous nature yet if they be not directed by the person, using them against each other, and so no danger to be reasonably apprehended, and if death casually ensue, it is but manslaughter; as if persons be shooting at game, or butts, or any other lawful object, and a bystander be killed. And it makes no difference with respect to game whether the party be qualified or not, but if the act be unlawful in itself, as shooting at deer in another's park without leave, though in sport and without any felonious intent, whereby a bystander is killed, it will be manslaughter; but if the owner had given leave or the party had been shooting in his own park, it would only have been misadventure." Lord Hale, at page 475, gives the same instance. And it is urged that this instance is exactly similar to the one before us, but not so.

According to Sir William Blackstone, in his commentaries, book 2, p. 415: "For sometime prior to the Norman Con-

quest, every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests, as is fully expressed in the laws of Canute and Edward the Confessor. *Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum.*" And further on it is said: "That if a man shoots game on another's private ground and kills it there, the property belongs to him on whose ground it was killed. The property arising *ratione soli* * * * On the Norman Conquest, a new doctrine took place, and the right of pursuing and taking all beasts of chase or venary, and such other animals as were accounted game, was then held to belong to the king, or to such only as were authorized under him." Again: "But if the king reserve to himself the forests for his own exclusive diversion, so he granted from time to time, other tracts of land to his subjects under the name of chases or parks, or gave them license to make such in their own parks. And, by the common law, no one is at liberty to take or kill any beast of chase but such as hath an ancient chase or park." In Enc. Brittanica we read that the chases or parks were much the same, except that the parks were enclosed, having a tendency to make the game, contained therein, more completely and exclusively the property of the owner. Anyone who entered them was a trespasser, and in shooting the game therein, his act can be likened to that of the case put by Foster, East and Lord Hale, where one wantonly shot another's chicken. He was engaged in the effort to destroy another's property, and the act could well be considered *malum in se*. But not so here. We have never transplated to this country either the Saxon or Norman theory as to the right to take and appropriate game. Here, it is considered the property of the captor, except perhaps, in the case of bees.

It is said in Cooley on Torts: "As regards beasts of chase, the English law is that if a hunter shoots and captures a beast on the land of another, the property is in him as in the

owner of the land. Under the civil law, the property passed to the captor. And such is believed to be the recognized rule in America, even where the capture has been effected by means of a trespass on another's land." *State v. House,* 65 N. C., 315.

The act of the defendant, therefore, was not in the effort to destroy another's property, but was strictly *malum prohibitum. State v. Vines,* 93 N. C., 493, and *State v. Dorsey,* 118 Ind., 167, are cases apparently opposed to our present decision, but neither is really so. In *State v. Vines* the sport was imminently dangerous, amounting to recklessness; and in *State v. Dorsey* the element of criminal negligence was also present, and in this case a State statute governing the construction was given much weight. Neither the one case nor the other required any critical examination of the doctrine as sometimes stated, that an unintentional homicide, occasioned when in the commission of an unlawful act, is manslaughter. The verdict in the case before us negatives both the elements of guilt (present in these two cases), declaring that the act was not in itself dangerous and that the defendant was not negligent.

Again, it has been called to our attention that courts of the highest authority have declared that the distinction between *malum prohibitum* and *malum in se* is unsound, and has now entirely disappeared. Our own court so held in *Sharp v. Farmer,* 20 N. C., 255, and decisions to the same effect have been made several times since. Said *Ruffin, C. J.,* in *Sharp v. Farmer:* "The distinction between an act *malum in se* and one *malum prohibitum* was never sound and is entirely disregarded, for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law." It will be noted that this decision was on a case involving the validity of a contract, and the principle there established is undoubtedly correct. The fact, however, that the

judge who delivered the opinion uses the words "was never sound," and that other opinions to the same effect use the words "has disappeared," shows that the distinction has existed; and it existed too at a time when this feature in the law of homicide was established. And we are well assured that because the courts, in administering the law on the civil side of the docket, have come to the conclusion that a principle once established is unsound and should be rejected, this should not have the effect of changing the character of an act from innocence to guilt, which had its status fixed when the distinction was recognized and enforced.

It was further suggested that the homicide was one of the very results which the statute was designed to prevent, and to excuse the defendant would be contrary to the policy of the act. But this can hardly be seriously maintained. It will be noted that it was not the owner of the land who was killed, but the defendant's comrade in the hunt; and of a certainty, if our Legislature thought that conduct like that of the defendant was dangerous and the statute was designed to protect human life, some other penalty would have been imposed than a fine of "not less than five dollars and not more than ten." It is more reasonable to conclude that the act in its purpose was designed to prevent and suppress petty trespasses and annoyances, such as leaving open gates, throwing down fences, treading over crops, etc.

The special verdict having established that the act of the defendant was entirely accidental, it is a relief that we can declare him innocent in accordance with accepted doctrine, and that in the case at bar the law can be administered in mercy as well as justice. Quoting again from that eminent judge and humane and enlightened man, Sir Michael Foster: "And where the rigor of law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of the judges to be perpetually hunting after forfeitures, where the heart is free from guilt. They are

ministers appointed by the Crown for the ends of public justice, and should have written on their hearts the solemn engagement His Majesty is under to cause law and justice in mercy to be executed in all his judgments." We know that in this spirit the judge below dealt with the defendant and his cause; for though the judgment of His Honor impelled him to the conclusion of guilt, he imposed the lightest punishment permissible for the offense.

There was error in holding the defendant guilty, and, on the facts declared, a verdict of not guilty should be directed and the defendant discharged.

Reversed.

WALKER, J., concurs in result only.

STATE v. McINTYRE.

(Filed November 7, 1905).

Intoxicating Liquors, Possession of—Statute Construed.

1. Under the provisions of section 20, chap. 800, Laws 1905, providing that it shall be unlawful for any person to have in his possession more than two gallons of whiskey at any one time, and the possession of a greater quantity shall be *prima facie* evidence that such person is engaged in the illegal sale of liquor, the Legislature only intended to give the possession of more than two gallons of whiskey evidential force on the charge of illegal sale and did not intend to make the possesion of such quantity of whiskey in itself a crime.

2. *Quere:* Whether it is in the power of the Legislature to make the mere ownership or possession of a given amount of whiskey in itself a crime.

INDICTMENT against William McIntyre, heard by *Judge Fred Moore* and a jury, at the August Term, 1905, of the

Superior Court of CUMBERLAND County. There was a verdict of guilty, and from the judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Thos. H. Sutton and *N. A. Sinclair* for the defendant.

HOKE, J. The defendant was indicted under the law regulating the sale of intoxicating liquors in Cumberland County, for having in his possession and under his control more than two gallons of whiskey at one time with intent to sell the same.

The statutes under which the defendant was convicted (Laws 1903, chap. 125, and Laws 1905, chap. 800,) contain no such offense as that specifically charged in the bill of indictment. They make it unlawful to rectify, manufacture, sell or otherwise dispose of, for gain, intoxicating liquors, etc., establish minute regulations for the sale of whiskey by druggists for medicinal purposes, and impose specific duties on various officers in enforcement of the acts, but, nowhere, so far as we can discover, make it indictable to have in possession whiskey with intent to sell.

It is argued that under section 20, chapter 800, Laws 1905, "the having in possession more than two gallons of spirituous liquors" is unlawful, and rejecting the concluding words of the charge "with intent to sell," as surplusage, the indictment would contain a distinct and substantive offense, made criminal by the law. We do not think, however, that this was the intent of the Legislature, nor is it a correct interpretation of the section. The statute had already clearly defined the acts, made criminal so far as individuals were concerned, imposing specific and severe punishment for its violation, and is here dealing with the administrative features of the law. The entire section reads: "That it shall be unlawful for any person to have in his or her possession,

or under his or her control, more than two gallons of spirituous liquors or more than five gallons of malt liquors at any one time, and the possession of a greater quantity shall be *prima facie* evidence that such person is engaged in the illegal sale of liquor." This is all in one sentence, and the latter part of it, "shall be *prima facie* evidence," gives clear indication that it was the only effect contemplated as the result of forbidden possession contained in the first part of the sentence—the correct interpretation being that the Legislature only intended to give the possession of more than two gallons of whiskey evidential force on the charge of illegal sale, and did not intend to create a distinct and substantive offense.

We are confirmed in this conclusion by the consideration that there is grave doubt if it is in the power of the Legislature to make the mere ownership or possession of a given amount of whiskey in itself a crime. The right to own property is ordinarily one of the rights regarded as fundamental, which may not be forbidden, forfeited or interfered with by legislation except in the assertion of eminent domain or in the exercise of the police power. Only in the rarest instances can the police power be called on to regulate or control the conduct of individuals in the privacy of their own homes, or when not involving any relationship to others or the public.

It is true that the Supreme Court of the United States in *Mugler v. Kansas,* 123 U. S., 62, and in several cases since that time, has given decided intimation that the police power can lawfully be extended to almost any phase of the use of spirituous liquors, and that the Legislature must determine the extent of its exercise. And this is certainly the general trend of the modern decisions on the subject.

At the same time, no legislation, so far as we recall, has as yet gone to the extent of making the mere ownership or possession of whiskey a crime except perhaps in furtherance

of a State monopoly when in aid of the State's revenue. "They have all stopped short of dealing with private consumption of whiskey," says a recent writer on the subject. The only one we have discovered which approaches the extent claimed for the present law, was one in the State of West Virginia, making it a crime to keep in possession spirituous liquors for another, and this was declared unconstitutional by the Supreme Court of that State. *State v. Gilman,* 33 W. Va., 146.

The court does not desire or intend to express an opinion on this very important question. The comments are only made in support of the position that the act in question, from the context and the casual and incidental way in which it is expressed, does not, and does not intend to, make the possession of whiskey in itself a crime, but that such possession of the prohibited quantity was only evidential in prosecution for the illegal sale of spirituous liquors, made criminal by other sections of the act.

We hold that no crime is charged against the defendant in the bill of indictment, and the judgment against him must be arrested.

Judgment Arrested.

STATE v. HORNER.

(Filed November 15, 1905).

Homicide—Confessions—Argument of Counsel—Self-Defense—Resisting Arrest—Evidence.

1. Confessions, obtained by threats made, or inducements held out, to persons under arrest, or surrounded with a number of pursuers or otherwise so situated as to render it doubtful whether they were freely and voluntarily made cannot be used against a person charged with a crime.

2. Where, however, it appears that no inducements were offered the prisoner and no threats made, and after the arrest he was treated kindly, and did not seem to be excited or afraid, and began the conversation on the way to jail, with those who had arrested him, the fact that the prisoner was tied and had been shot by those who arrested him and two men were in the wagon with him and three or four others following, does not render his confession made under such circumstances, inadmissible.

3. Exceptions relating to the language of counsel must ordinarily be left to the discretion of the trial judge and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury.

4. Unless an exception to language used by counsel is taken, either at the time the language is used, or by request to the court to instruct the jury that they must disregard the objectionable language, it cannot be assigned as error.

5. There is a difference between arguments addressed to the jury, which are either illogical or irrelevant, and the use of abusive and degrading epithets or characterization of parties or witnesses.

6. Where the prisoner knew that the deceased was a deputy sheriff, and that he had a warrant for his arrest for a misdemeanor it was his duty to submit to arrest and in resisting it, with a gun in his hand, it is not open to him to say that he acted in self-defense and this is not affected by the fact that the officer was not justified in shooting him to make the arrest.

STATE *v.* HORNER.

8. When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense.

INDICTMENT for murder against Jas. K. Horner, heard by *Judge Geo. W. Ward* and a jury, at the August Term, 1905, of the Superior Court of ORANGE County. From a verdict of murder in the second degree and the sentence thereon, the prisoner appealed.

Robert D. Gilmer, Attorney General, and *Winston & Bryant* for the State.

Boone & Reade, S. M. Gattis, P. C. Graham and *J. W. Graham* for the prisoner.

CONNOR, J. Prisoner was charged with the murder of one Nichols, a deputy sheriff. Deceased was endeavoring to arrest prisoner, having in his hands a warrant for a misdemeanor. After a verdict of murder in the second degree, followed by a judgment, prisoner appeals, assigning a number of errors in His Honor's rulings. It is not necessary to consider all of the exceptions because if there is no element of self-defense disclosed in the testimony, His Honor correctly instructed the jury that they should find the prisoner guilty of manslaughter at least. There is no exception pointed to the instruction in regard to murder in the second degree. The first exception is directed to the admission of evidence tending to show a confession. The State introduced one G. C. Ray, who testified that he assisted in bringing prisoner to jail. He had been shot by those who arrested him. Did not seem to be suffering very much from the shot. After travelling two or three miles, prisoner began the conversation. Two men were with him in the wagon, three or four others following on horses and in buggy. He was tied but had stated that tieing did not hurt him. There was a

bed in the wagon and he seemed to be comfortable. No inducements were offered him and no threats made. He did not seem to be excited. Dr. Jordan was called who testified that he examined prisoner after he was arrested and found that his neck was peppered with small shot—seemed to be suffering some pain; was feeble from having been in the woods for sometime without nourishment. He was complaining of a dislocated shoulder. Witness set his shoulder and had food provided for him. After the arrest he was kindly treated, no indignities were offered him—seemed to be perfectly sound in mind. Did not seem to be afraid when the guard started with him to jail. The court found that the statement was voluntary. Witness Ray was asked to state what he said. Prisoner objected—objection overruled and prisoner excepted. Witness stated that prisoner asked when Nichols died and what part of his body he was shot. He said that Nichols acted too hastily in following him and that he had acted too hastily in shooting him. That Nichols had lost his life and he would now lose his. He said that he told Nichols that he was not going to be arrested by him; that Nichols said he would arrest him; that he told Nichols if he followed him he would shoot him; that Nichols did follow him and that when he got within five or six feet of him, he turned and shot. Witness asked him who shot first and he said that some of them told him that Nichols shot at him first with a pistol. The exception cannot be sustained. This court has uniformly refused to permit confessions, obtained by threats made, or inducements held out, to persons under arrest, or surrounded with a number of pursuers or otherwise so situated as to render it doubtful whether they were freely and voluntarily made to be used against a person charged with crime. We have no disposition to depart from or weaken the salutary and humane principle upon which the decisions are based. We fully approve the language of *Mr. Justice Reade,* in *State v. Dildy,* 72 N. C., 325, in re-

gard to the admissibility of confessions. We think, however, that the confession made in this case comes directly within the exception "when he voluntarily opens the door and invites us in." The testimony of Ray and Dr. Jordan brings the case clearly within the decisions of this court in *State v. Whitfield,* 109 N. C., 876; *State v. Daniels,* 134 N. C., 641; *State v. Exum,* 138 N. C., 599. The next exception is directed to the language used by the counsel for the State referring to the prisoner as an "outlaw." It appears that counsel, assisting the solicitor in his opening speech, argued that from the evidence prisoner was an outlaw to which no objection was made. Counsel for prisoner replied vigorously to the language used by counsel for State. The solicitor in his closing argument referred to the criticism of the counsel for prisoner and argued that upon the evidence prisoner was an outlaw. Prisoner's counsel objected and asked the court to hold that such language was improper. His Honor did not respond to this request. The solicitor then stated, that as he understood it, an outlaw was a man who put himself beyond and outside the reach of the law. That prisoner admitted that he had been indicted in the State and Federal courts, and that when the officer came to arrest him, he would not go with him, etc., and he submitted to the jury that from these facts the imputation that he was an outlaw was not an unjust one, but was warranted from all the facts and circumstances of the case. To these remarks prisoner excepted. As has been frequently said by the court in passing upon exceptions to language used by counsel, it is difficult to define the line between that which rests in the sound discretion of the presiding judge and that which, as a matter of law, is subject to revision upon exception and appeal. The exception was duly and in apt time, taken and the question is fairly presented whether the language of the solicitor falls within the prohibited domain of debate as being prejudicial to the pris-

oner. *Reade, J.*, in *Jenkins v. Ore Dressing Co.*, 65 N. C., 563, says: "It is difficult to lay down the line, further than to say, that it must ordinarily be left to the discretion of the judge who tries the cause; and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross, and well calculated to prejudice the jury." It is settled by this court that unless exception is taken, either at the time the language is used, or by request to the court to instruct the jury that they must disregard the objectionable language it cannot be assigned as error. The cases are collected and discussed in *State v. Tyson*, 133 N. C., 692. The solicitor did not apply the term "outlaw" to the prisoner in the sense in which it is used in the statute, as one who was to be dealt with otherwise than by the procedure provided for the trial of those charged with crime. It is not very clear in what way or for what purpose the term was used or intended to impress the jury. The fact that he was being tried according to the forms of law excluded the idea that it was contemplated that the jury should convict otherwise than as they were sworn and charged according to the law and the evidence. It would seem that counsel were indulging in that kind of license which poets claim and are permitted to indulge. We cannot think that the jury in the light of the charge of the court, supposed that they were trying the question submitted to them by the solicitor, whether, upon the evidence, the argument that he was an outlaw, was justified. There is a difference between arguments addressed to the jury, which are either illogical or irrelevant, and the use of abusive and degrading epithets or characterization of parties or witnesses. The former may be disposed of in reply, or, either of its own motion, or upon request by the court; they are usually disposed of by the common sense and intelligence of the jury. Abusive epithets or denunciatory characterizations, unless counteracted, are calculated to prejudice the minds of jurors, arouse their passions and un-

settle their judgments. It is a matter of common observation that a charge made against a man without foundation, will make but little and only temporary lodgment in the mind of others, whereas an odious or degrading name or term of reproach once attaching to a person will follow and degrade him for years. No one was contending in this case, nor was it material to the guilt of the defendant to maintain the proposition that the deputy sheriff would have been justified upon the testimony in shooting the prisoner. The question, whether he had placed himself beyond or outside the protection of the law, was not involved in the issue. It was rather whether, assuming that the officer unlawfully shot at him, the prisoner's attitude and conduct was such that he could, even in self-defense, take the life of the officer. In many cases the attitude of both parties precludes a successful defense when charged with felonious homicide. While it would have been eminently proper for the judge, in his charge, to have said to the jury that they should discard from their minds all that was said in regard to the prisoner being an outlaw, and doubtless he would have done so, it is manifest that in his opinion that and very much more of the argument became irrelevant because of the instruction which he gave in regard to the law of the case. While we do not commend the use of any term of reproach in regard to a witness, and certainly not to a defendant on trial, we cannot say that the breach of privilege is gross or manifestly prejudicial. The prosecuting officer is in a sense and, in a very important sense, a judicial officer and aids the court and jury in the administration of the criminal law. He should use a sound judicial discretion, both in respect to the evidence he will offer and the arguments he will use to aid the jury in arriving at a correct verdict. Representing the people of the State, he wishes no verdict against the citizen unless it is the result of truthful, competent testimony, considered in the light of fair, legitimate argument. We are sure such

is the rule by which the prosecuting officers of the State are guided. While we do not think that upon principle and decided cases, the language used, and the course pursued would entitle the prisoner to a new trial, it is manifest that, in the light of the instruction given the jury, no harm in this respect was done the prisoner. His Honor instructed the jury that the testimony considered in the light most favorable to prisoner made him guilty of manslaughter at least. The exception to this instruction is based upon the contention that in certain aspects of the testimony, if believed by the jury, the homicide was *se defendo*. For the purpose of passing upon this exception, the testimony of prisoner in his own behalf, together with other testimony from which the most favorable inferences could be drawn, should alone be considered. The State introduced A. W. Breez, a deputy sheriff, who testified that deceased had a warrant for prisoner charging him with a misdemeanor. That witness went with deceased to make the arrest—drove into the yard—no one in house—saw prisoner's wife and sister in the yard. Deceased searched the house, did not find prisoner. Started towards the house of prisoner's son, when deceased said: "Yonder is Knapp now. He was squatted down behind a tree with a gun in his lap. Deceased said he would go and talk with him. Just as he got to him, deceased said, "If you will meet me at 'Squire Terry's tomorrow at 2 or 3 o'clock, I will summon witnesses and go back home." Prisoner said, "I will go with you nowhere—no such trash as you are, and if you follow me I will shoot you." Deceased called to witness to come on. Prisoner walked further back into the woods. Witness got out of buggy and fastened mule—"just as I got last trace undone, heard both shots fired at same time. I started in a run and met Nichols about ten steps on side next to road." Witness described condition of deceased; his lan guage in regard to the extent of his wounds—that he was bound to die, etc., and further that he said, "Defendant

Horner shot first and he shot next; that Horner ran after he shot; that they were not five steps apart, he said he did not try to hit defendant and that defendant just flung his gun around and shot." He further testified in regard to seeing the warrant and finding pistol in pocket of deceased, one chamber empty, etc. It was in evidence that deceased had gone to prisoner's house with warrant before, but had not arrested him.

Prisoner testified: "I was in the woods; dog had treed a squirrel. Nichols and Breez came on down the road. Nichols called to me and I answered. He said come on and go with me; had a warrant; he read it. I said I am not going to do it; he said if I would promise to be at 'Squire Terry's tomorrow at 3 o'clock, he would go. I refused. He came on me and said to me (with an oath) 'if you do not go with me I am going to shoot you.' Then I picked up gun and walked off; he shot at me; I ran about fifty yards; he shot again and I threw gun around and shot. I was going away from him; was out there for a squirrel. I ran against a tree when he was after me; knew that deceased was a deputy sheriff." Witness also testified that deceased came to his house that morning with the warrant and that he, prisoner, said that he had done nothing, wanted to see the prosecutrix who had sworn out the warrant and fix it up. That he went into the house to get his shoes and came back; deceased drew his gun on him and cursed him, saying he was going to kill him. Prisoner had no gun when he came out of the house; deceased had a gun. There was other testimony in regard to the conduct and language of the parties at the prisoner's house in the morning, also by witnesses who heard the two shots in the woods. Taking the testimony of the prisoner to be true, and we find nothing in the other testimony more favorable to him, we concur with His Honor that the plea of self-defense cannot be sustained. He admits the homicide with a deadly weapon, thereby taking upon

himself the burden of showing that he was acting in self-defense. The deceased was acting strictly in the line of his duty in endeavoring to make the arrest and the prisoner was, upon his own showing, avoiding, if not resisting arrest. The principle governing the case is thus stated by *Pearson, C. J.*, in *State v. Garrett,* 60 N. C., 145, "When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense." The application of this principle to prisoner's testimony sustains His Honor in saying to the jury that he was guilty of manslaughter at the least. 21 Am. & Eng. Enc. (2nd Ed.), 122; *Talbert v. State,* 71 Miss., 179 (42 Am. Rep., 454); *State v. Shaw,* 73 Vt., 149; *State v. Alford,* 80 N. C., 445. The prisoner knew that deceased was a deputy sheriff and that he had the warrant for his arrest. It was his duty to submit to arrest, and in resisting it, with a gun in his hand, it is not open to him to say that he acted in self-defense. Conceding that, as he was going away from the officer, refusing to submit to arrest, the officer was not justified in shooting him to make the arrest, does not affect his right to kill. If there was a necessity to shoot the deceased to save his life, it was the result of his unlawful act in resisting the mandate of the law. The position of the prisoner is similar in this respect to one who brings on or provokes a difficulty, and in the progress of it, kills. It is not *se defendo* because he brought on the necessity. This is elementary and uniformly sustained by numerous cases in our own and other jurisdictions. The learned counsel for the prisoner calls to our attention many authorities discussing and defining the power and right of the officer in making arrests. We concur with his views upon that question, but as we have said, and His Honor held, that is not the test of the prisoner's guilt. It may be that the

prisoner was right in saying that both acted hastily, but he was in the wrong in refusing to submit to arrest, and the law fixes the responsibility for the homicide upon him. If the killing is of malice, it is murder; if premeditated, it is murder in the first degree—in no aspect is it in self-defense. This view renders it unnecessary to consider the numerous exceptions to the refusal of His Honor to give special instructions, many of which were correct propositions of law, but not applicable to the testimony. His Honor correctly instructed the jury in respect to the difference between manslaughter and murder and the different degrees of murder. We have examined the record with the care which the result of our conclusion demands. His case was argued by counsel with a wealth of learning and ability. He chose to resist arrest for a misdemeanor and brought upon himself the awful crime of which, upon his own testimony, he stands properly convicted. It must be certified that there is

No Error.

STATE v. JONES.

(Filed November 15, 1905).

Towns—Eminent Domain — Condemnation Proceedings — Notice to Landowner—Payment of Damages—Method of Appraisal—Constitutional Law.

1. The Charter of Creedmoor (Chap. 398, Private Laws 1905,) with reference to condemnation of streets, which provides for notice when the landowner's property is to be appraised and his compensation fixed, is valid though it makes no provision for notifying him of contemplated action by the commissioners.

2. While a landowner is not entitled to notice, when the Legislature, or the commissioners to whom it has delegated its power, appropriates his property to a public use, he is, however, entitled to notice and a hearing when his compensation is fixed.

3. An assessment for damages in a condemnation proceeding need not be by a jury of twelve freeholders—it is not a controversy within the meaning of the Bill of Rights.

4. The provision of the Charter of Creedmoor that one of the appraisers shall be appointed by the commissioners and giving the landowner the right to appoint one and those two shall select a third, with a right of appeal to the Superior Court, is valid, though it omits to provide for the appointment of an appraiser if the landowner refuses and though all the appraisers are freeholders of the town.

5. As soon as the commissioners in the exercise of the powers delegated to them appropriated the land to a public street, they had the right to enter and open it without awaiting the payment of damages.

6. The requirement that the report of appraisers shall lie in the mayor's office for 10 days for purposes of investigation and appeal and that unless an appeal is taken from such report "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid," etc., applies only to the procedure for fixing the price to be paid and means that if no appeal is taken from the appraised value, the land shall stand condemned *at such value* and the appeal does not postpone the right of entry.

CONNOR, J., dissenting.

STATE *v.* JONES.

INDICTMENT for forcible trespass against Jesse Jones and others, heard by *Judge W. B. Councill* and a jury, at the July Term, 1905, of the Superior Court of GRANVILLE County. Upon a special verdict, setting out the facts, His Honor adjudged the defendants not guilty and the State appealed.

Winston & Bryant and *Graham & Devin,* with the *Attorney-General,* for the State.

B. S. Royster and *T. T. Hicks* for the defendants.

BROWN, J. The defendants, acting under the authority of the Board of Commissioners of the Town of Creedmoor, entered upon certain land of S. H. Rogers, the prosecuting witness, within the said town and proceeded to open and lay out a public street. Rogers was present and objected. We assume that the acts of the defendant, Lyon, who was mayor, and his associates, constituted a forcible trespass unless they were duly authorized to enter upon and take possession of said land and open it as a public street. At a meeting of the board on May 16, 1905, the commissioners adopted a resolution condemning the land, upon which the trespass is charged to have been committed, for use as a public street and directing that it be opened. The resolution provided for the appointment of an appraiser on behalf of the town and for notice to Rogers to select his appraiser, and fix a time and place for Rogers and his appraiser to meet the town appraiser on the premises to fix the compensation.

The Town of Creedmoor was chartered by the General Assembly of 1905, Private Acts, chapter 398. Section 15 of the act gives to the commissioners plenary power to condemn land for streets, sidewalks and for other town purposes, and makes it their duty to keep the streets in repair. Section 17 prescribes the machinery for condemning land for streets or for other town purposes, and provides that the value shall be appraised by three freeholders of said town

qualified to act as jurors and not connected by blood or marriage with the landowner or officially with the town. The section also provides for an appeal. In case no appeal is taken within ten days the condemnation proceedings are final and the money awarded shall be paid from the town funds.

So far as we can see, the authorities of the town acted in strict conformity to the act in passing the resolution condemning the property. They appointed an appraiser and notified Rogers to select one. The fact that he refused and that he appealed to the Superior Court could not have the effect to delay the opening of the street until the appeal was finally determined. The appeal was not from the resolution condemning and appropriating the land to a public use. That was a legislative *ex parte* act of which Rogers was not entitled to notice and to which he could not be a party. The appeal was necessarily from the report of the appraisers fixing the compensation. As we shall hereafter see, the delay occasioned thereby in the payment of the money could not stay the sovereign power in taking possession of the land.

We agree with the Attorney-General that if the provisions of the charter of Creedmoor are insufficient so that the power of eminent domain cannot be lawfully exercised by the town authorities, the defendants would be guilty. It is objected that the charter makes no provision for notice to the land owner, and, therefore, defendants cannot justify under it. Mr. Mills, in his work on Eminent Domain, states that notice is not absolutely necessary. Seizure is constructive notice and the character of the proceeding gives notice to the world. Section 94. But we hold that, while the landowner was not entitled to notice, when the Legislature, or the commissioners to whom it has delegated its powers, appropriated his property to a public use, he was, however, entitled to notice and a hearing when his compensation was fixed. Mr. Elliott, in his work on Roads and

Streets, sec. 200, examines this question carefully and says: "It is, however, held in most of the cases which have given the subject careful consideration that a statute will be valid which determines without any interference a question of the necessity for the appropriation, or submits it without providing for notice to an inferior tribunal, but that a statute which undertakes to determine the question of compensation or to submit it to commissioners or appraisers, without providing for notice, is unconstitutional." The same author says, in sec. 198: "There are some courts of high authority which hold that although notice is indispensable, it is not essential to the validity of the statute that it should provide for notice, and that it is sufficient if due notice is actually given." The authorities he cites are from some of the ablest courts in this country and fully support the author's views.

Of what steps and proceedings is the landowner entitled to notice. Mr. Lewis, in his work on Eminent Domain, vol. 2, sec. 66, answers the question as follows: "All questions relating to the exercise of the eminent domain power and which are political in their nature and rest in the exclusive control and discretion of the Legislature may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made or the particular property taken are questions of this character and the owner is not entitled to a hearing thereon as a matter of right.

Other authorities hold the same view. The Supreme Court of Ohio says: "It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled of right to a hearing in court and the verdict of a jury." *Zimmerman v. Canfield*, 42 Ohio St., 463. To the same effect, see *People v. R. R. Co.*, 160 N. Y., 225.

While the charter of Creedmoor makes no provision for notifying the landowners of contemplated action by the com-

missioners, it provides for ample notice when the landowner's property is to be appraised and his compensation fixed. In fact, it gives him the right to appoint one of the appraisers and provides that one shall be appointed by the commissioners and those two shall select a third. The charter further provides that the report of the appraisers shall be signed by at least two of them and shall be filed with the mayor and "lie in his office ten days and be subject to inspection." It also provides for an appeal to the Superior Court by the landowner if he is dissatisfied. Giving the landowner the right to select one of the appraisers and the right of appeal are tantamount to an express provision requiring notice to him of the appraisement. The board required such notice to be given to Rogers and it is admitted that he refused to act under it and to appoint an appraiser. If he had not received the notice he could not have refused to act. Instead of selecting "his man," as the statute provided, at the appointed hour he appeared on the ground and seated himself upon the fence and thereby endeavored to obstruct the opening of the street.

Mr. Randolph, in his work on Eminent Domain, sec. 338, says: "A condemnation proceeding which does not provide for notice seems to be considered in some decisions as essentially defective. But the better view is that such act may be made effective by actually giving the proper notice. Thus it has been held that notice is plainly intended where the act contemplates the participation of the owner in the proceedings, as where it authorizes him to assist in striking a jury or gives him the right to appeal."

See also *State v. Jersey City,* 24 N. J. L., 662; *State v. Trenton,* 36 N. J. L., 499; *Kramer v. Cleveland,* 5 Ohio St., 140; *Swan v. Williams,* 2 Mich., 427; *Belt Ry. v. Bretzell,* 75 Md., 94; *Peoria, etc., R. Co. v. Warner,* 61 Ill., 52.

Mr. Lewis recognizes it as settled law by repeated adjudications that statutes authorizing condemnation and making

no provision for notice are valid if actual notice is given. Lewis on Eminent Domain, sec. 368. But it is unnecessary that we should go that far in this case. But at the same time he says: "By far the greater portion of the cases proceed upon the principle of implying a requirement to give notice from the provisions of the statute itself." The implication requiring notice in the charter of Creedmoor is plain, and in pursuance thereof the notice was given. That is the ground upon which we place our decision.

2. Has the statute provided a proper tribunal to fix the compensation?

We agree with the learned Chancellor of New York that "the government is bound in such cases to provide some tribunal for the assessment of the compensation or the indemnity before which each party may meet and discuss their claims on equal terms." 2 Kent Co., 399.

There is no constitutional provision in our State which guarantees a jury trial in such proceedings. The Constitution of the State does not refer to the right of eminent domain. The right to condemn and the duty to pay compensation are recognized by the courts as a right and duty appertaining to sovereignity, which the State may exercise freely upon all proper occasions and which a jury has no right to control, except where an appeal is taken and tried in the *nisi prius* courts. *Scudder v. Trenton Falls Co.*, 1 N. J., Eq., 694.

It was held by this court as early as 1837, in an elaborate opinion by *Chief Justice Ruffin*, that an assessment for damages in such a proceeding need not be made by a jury of twelve freeholders. It is not a controversy within the meaning of the Bill of Rights, nor is it such a trial by jury as that instrument declares shall be "sacred and inviolable." *Railroad v. Davis*, 19 N. C., 452. If, however, a jury trial were guaranteed the landowner by the fundamental law, his rights in that respect are fully protected by his right of appeal to a court where all issues of fact are triable by jury.

State v. Lytle, 138 N. C., 738. The method for the assessment of damages in the Creedmoor charter has been passed upon and fully approved by this court in *State v. Lyle*, 100 N. C., 499. In that case the charter of Reidsville was under consideration and the section relating to the appraisement is copied in the opinion of *Chief Justice Smith*. The two are nearly identical, with the exception that in the Reidsville charter the mayor can appoint an appraiser if the landowner refuses. We do not think such omission in the Creedmoor charter invalidates it, for if the landowner refuses to select an appraiser it is his own folly. It is not necessary for us to decide as to the power of the mayor to fill the vacancy on the board of appraisers occasioned by the obduracy of the landowner. As he has taken an appeal his damages will be assessed *de novo* by a tribunal whose jurisdiction is undoubted. Certainly the stubbornness of the landowner cannot be permitted to put a stop to the exercise of an undoubted and necessary power given to all towns by the General Assembly. The fact that the appraisers are freeholders of Creedmoor makes no difference. The question has been decided in other States, as well as our own, and it has been held that where there is a right of appeal, or where there is authority in a court of competent jurisdiction to review the proceedings, the common council of the town seeking to appropriate the land may appoint all of the appraisers. Elliott on Roads and Streets, sec. 281, and cases cited. In the Reidsville charter, passed upon by this court in *Lyle's case*, the statute provided that all the appraisers should be freeholders and citizens of the town. *Lyle's case* is practically on all-fours with this, and as it has remained unchallenged since 1888, we see no reason to overrule it now. It is cited and approved in several cases, the latest being *Railroad v. Newton*, 133 N. C., 134.

3. As soon as the commissioners in the exercise of the powers delegated to them appropriated the land to a public

street, they had the right to enter and open it without awaiting the payment of damages. *State v. Lyle, supra;* Cooley Const. Lim., sec. 480. This question is fully discussed in *Lyle's case* and sound reasons given why the public needs should not await the assessment and payment of damages. We think that decision is supported by the great weight of authority. *Railroad v. Davis, supra; Railroad v. Parker,* 105 N. C., 246; *Railroad v. Newton, supra.*

The present *Chief Justice* says in *Newton's case:* "Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right of way, nor was the compensation required to be paid before entry. The Code, sec. 1946, changed this as to railroads by requiring the company to pay into court the sum assessed before entry." This opinion was approved by a unanimous court and delivered in 1903. A distinction is made as to the time of payment in cases where the seizure is made by the sovereign (as in this case), and where the land is condemned by a *quasi* public corporation exercising the power of eminent domain. In the former case, and in the absence of constitutional restrictions, it is held in most of the States that the making of compensation need not precede an entry upon the property where (as in this case) provision is made by the sovereign power for the payment of the money. Lewis on Eminent Domain, sec. 456, and notes thereto, citing all the cases to that effect; Randolph on Eminent Domain, sec. 291; Am. & Eng. Enc. (2nd Ed.), vol. 10, p. 1139, and cases cited; Elliott, sec. 241. In Mills on Eminent Domain, sec. 125, North Carolina is put down as one of the States wherein it is held that compensation need not precede the entry, but that there may be an entry and adjustment afterward. *Johnston v. Rankin,* 70 N. C., 550; *Railroad v. McCaskill,* 94 N. C., 746.

The statute requires the report of appraisers to lie in the mayor's office for ten days for purposes of inspection and appeal and provides that unless an appeal is taken from such

report "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid," etc. We think that this applies only to the procedure for fixing the price to be paid and means that if no appeal is taken from the appraised value the land shall stand condemned *at such value*. The appeal is not allowed to postpone the right of entry. Such a construction as that would seriously interfere with and indefinitely delay public works, such as opening or extending streets and the like. "Public policy forbids the suspension of operations on works of internal improvement during the pendency of litigation to ascertain the damage to which parties may be entitled." *Phifer v. Railroad,* 72 N. C., p. 434.

For the reasons given we are of opinion that the entry of defendants was rightful and that upon the special verdict they are not guilty. The judgment of the Superior Court is

Affirmed.

WALKER, J., concurring: The defendants are indicted for a criminal trespass and questions which might be open for discussion and decision, if there had been a direct attack made upon the proceedings for a condemnation of the land, by appeal or otherwise, are not to be considered in this collateral proceeding. It may be regarded as settled law that the power to take private property for public uses belongs to every independent government exercising sovereign power, for it is a necessary incident to its sovereignty and requires therefore no constitutional recognition. *U. S. v. Jones,* 109 U. S., 513. No provision for condemnation has ever been inserted in our Constitution, but the right of eminent domain or the right to condemn private property for public uses has always been conceded as essential to the due exercise of the powers of government and to the promotion of the public welfare. Legislation in the exercise of this inherent power, though subject to judicial control, is said

to be practically unlimited, if the purpose be a public one and sufficient provision is made for compensation to the owner of the property proposed to be taken. *Railroad v Davis,* 19 N. C., 451; *Lecombe v. Railroad,* 23 Wallace, 108. The mode of exercising the power of eminent domain, unless otherwise provided in the organic law, rests in the sound discretion of the Legislature, subject, however, to the principle just stated, that there must be sure and adequate provision for compensating the owner. *McIntyre v. Railroad,* 67 N. C., 278; *Lecombe v. Railroad, supra; Searl v. School Dist.,* 133 U. S., 553; *Cherokee Nation v. Railroad,* 135 U. S., 641. If the facts of this case are examined in the light of the foregoing principles, it cannot be doubted that the Legislature has assumed to exercise its unquestionable right to have land condemned in the town of Creedmoor for public streets. The Legislature has conferred upon the town commissioners general authority to act in the premises where lands are required for the purpose of opening and laying out streets or for other public purposes and has also provided a perfectly fair and sufficient method for ascertaining and paying just compensation to the land owners, whose property may be taken for the purpose. Priv. Laws 1905, chap. 398. In this case the prosecutor did not see fit to avail himself of the privilege given him to appoint one of the appraisers, but wilfully and obstinately refused to do so. He thus set the law at defiance. Not only did he attempt to shorten and weaken, but actually to paralyze the arm of the law when stretched forth in an effort to promote the public welfare, and for no good reason whatever. There is and cannot be any suggestion in this case, that he was about to be wrongly or oppressively treated or that his property was about to be taken without due process of law. When such has been the case, stout resistance to the last in protection of his own property and in vindication of his constitutional right, is justifiable. Such conduct is not stub-

bornness, but lawful resistance. Wilful and unreasonable obstruction to the due and orderly course of government and to the administration of law as declared by the proper authority is not only unwarranted, but entitles the offender to little or no consideration at the hands of the court, where there has been no clear violation of his rights. If he has lost any advantage secured to him by the statute, through his refusal to accept it, why should we hear him now complain of the alleged imperfect execution of the law growing out of his own misconduct, unless we propose to reverse or abolish the salutary maxim, that no man shall be permitted to take any benefit of his own wrong, by which principle, if it is to stand unimpaired, he should be judged. The statute gave him a perfectly fair and adequate remedy for the full protection of his property, and for the recovery of just compensation if the public good required that it should be taken. Will the courts allow him to thus trifle with the law, and to make his trifling the foundation of his complaint that it was not well executed?

But apart from these considerations, he has not lost any right by the supposed irregularity in the proceedings. The object in appointing the appraisers, is to ascertain the measure of compensation and nothing else. If he is dissatisfied with the decision of the appraisers, he is given the right of appeal and of this right he has availed himself. The way is now open to him for the ascertainment of his damages by a jury, the most impartial body known to the law, before whom his rights can be determined both as to the facts and the law. That he cannot complain under such circumstances, has been definitely and conclusively settled by this court, if we are not to disregard, but to follow its solemn adjudications and one in particular, which seems to me to dispose of all the disputed questions in this case and, a decision too which received full consideration from a court of exceptional learning and ability. In *Johnston v. Rankin,* 70 N. C., 550,

it appears that the sheriff had not only notified the landowner of the day on which the appraisement of his land proposed to be condemned for a street would be made, but, worse than this, he notified him that the jury would appraise it on one day, when in fact they appraised it on a different day, thus not only failing to give him notice, but misleading him. The court said he was not bound by the proceeding and "he might *perhaps* have regarded all after proceedings as trespasses, being under a warrant which was void as to him for want of notice," or he might have had the proceeding quashed. "But," says the court, "he appeals and thus vacates the assessment during the pendency of the appeal. By voluntarily becoming a party, he waives the irregularity of want of notice, and gives the appellate court jurisdiction to hear the case on the merits." He clearly waived, by appealing, any objection to the defect in the proceedings, which would otherwise have invalidated them, says the court in another part of its opinion. This case also definitely decides that the commissioners are the sole judges of the public use and of the necessity for taking the land and that the appeal involves nothing but the amount of compensation. "There is therefore nothing to forbid the defendants from proceeding with the improvement pending the appeal. The law of this State does not require compensation to be *first* made, as that of some States does." I have examined the charter then under review and find that it nowhere expressly authorizes entry upon the land before compensation is made, but it provides that, on payment of the amount of the appraisement, the streets may be opened. In *McIntyre v. Railroad*, 67 N. C., 278, the court says: "If the owner of land overflowed by a mill dam could bring his action on the case for damages every day, no public mill could be established. In like manner if the owner of land taken by a railroad for its track, could bring his action of trespass every day, no railroad could be built * * * If the

officers of the company cannot enter on lands and make surveys without a trespass, they could never locate the road. And if the road were located, and its construction delayed until the damages to all the land owners on the route were ascertained under the act, the delay would be indefinite, and of no benefit to anyone. To hold, that during the pendency of a proceeding by the company to have the lands condemned, it could not prosecute its works without being exposed daily to an action of trespass, would effectually defeat the policy of the act." To the same effect are *Railroad v. McCaskill,* 94 N. C., 746; *Railroad v. Davis,* 19 N. C., 451. In *Phifer v. Railroad,* 72 N. C., 433, it is held that the appeal carried the whole case into the Superior Court, "where the plaintiffs (the landowners) can have every right which they seek in the action adjudged and determined." And in *State v. McIver,* 88 N. C., 686, it was said to be the rule in this State in reference to the taking of private property for public uses, that the compensation to the owner need not precede the act of appropriation, if adequate provision is made for an assessment of his damages. Numerous other cases of like import might be cited, but those already mentioned will suffice to show the result of actual decision by this court upon the subject, and they are conclusive against the contention of the prosecution.

The words of this act, that if an appeal is not taken within 10 days "the land so appraised shall stand condemned for the use of the town and the price fixed by the appraisers shall be paid from the funds of the town," evidently mean that the appraisement shall stand as fixed by the appraisers and not that the town shall have no right to take the land until the time for appealing has expired, for condemnation always precedes appraisement. Much stronger language was used in the charter of Asheville, construed in *Johnston v. Rankin, supra,* and yet the court held in that case that the town could enter and proceed with the work of

laying out the street. But giving to the words we have quoted their broadest meaning, that the title did not pass until the time for appealing had expired, the town was not thereby forbidden to go upon the land for the purpose of laying out and constructing the street. We should always go to the farthest permissible length in protecting the rights and property of the citizen from unlawful interference, but some regard must also be had for the rights of the public, and we should be careful to see that the public welfare is not prejudiced by an undue consideration for private interests.

CONNOR, J., dissenting: I should be content to note my dissent from the conclusion reached in this case, but for the fact that I am deeply impressed with the conviction that the opinion, of course unconsciously, weakens the security of private property, and invites laxity, both of sentiment and conduct on the part of those to whom the Legislature is constantly committing the exercise of the highest act of sovereignty. "Laws which authorize the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private right but an imperative public necessity, and the exercise of this right of Eminent Domain, under color of which so many iniquities have been committed, should be held strictly within the bounds provided by the Constitution and the laws." *Refining Co. v. Elevator Co.*, 82 Mo., 121. "The appropriation of private property under the right of Eminent Domain is an exercise of sovereign power, and when reliance is placed upon statutes conferring the right, those statutes being in derogation of common right must be strictly construed, and the right cannot be exercised except in strict conformity to the power conferred." *Hurvey v. Railroad*, 174, Ill., 295.

"The privilege sought to be obtained by the application is against common right and the law should be construed

strictly against the privilege; and no question is better settled in this State than that where a special and limited jurisdiction is conferred by statute upon an individual or a court, the record must affirmatively show a compliance with all the requisitions of the statute." *Martin v. Rushton,* 42 Ala., 289.

"The law is jealous of the right of property holders, and adopts these formalities of procedure for their protection * * * The right of Eminent Domain, that of taking the property of the private citizen without his consent and devoting it to the use of the general public, is an exercise of the highest act of sovereignty. It can only be called into existence by the authority of the Legislature and by the tribunal provided by law. This statute prescribes the mode and I have no doubt whatever that it is mandatory. The failure of the city council to comply with it is fatal." *City of Madison v. Daley,* 58 Fed. Rep., 753.

"In cases like the present, it is always to be borne in mind that these acts of parliament are acts of sovereign and imperial power operating in the most harsh shape in which that power can be applied in civil matters. * * * Whoever considers the effect of this must see the consequences which frequently do happen to individuals. Property to which they have attached their whole fortunes and interests may be taken from them by an absolute exercise of imperial power, and their whole circumstances and situation in life may be entirely altered for a sum of money to be fixed by somebody else * * * The hardships imposed on individuals, I think, and I am glad to think, has of late years been subject to a more anxious consideration than it used to be. Probably the frequency of applications for such acts of parliament and the vast expense of the works have occasioned that particular consideration * * * It would be a strong measure indeed to allow men's property to be summarily taken from them, on the notion of the general benefit,

when the parties taking it have not done those things which are incumbent on them to secure their capacity and ability to complete the whole undertaking." Lord Langdale, M. R., in *Gray v. Railway Co.*, 9 Beav., 391.

"So high a prerogative as that of divesting one's estate against his will should only be exercised when the plain letter of the law permits it, and under a careful observance of the fomalities prescribed for the owner's protection." Cooley Const. Lim., 763.

"All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of Eminent Domain, which is more harsh and peremptory in its exercise and operation than any other, one judge saying, 'An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of property.'" Lewis Em. Dom., 254.

"In construing statutes which are claimed to exercise the right of Eminent Domain, a strict, rather than a liberal construction is the rule. Such statutes assume to call into active operation a power, which, however essential to the existence of government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property." Matter of Bridge Co., 108 N. Y., 483.

I have noted the expressions of these jurists and authors both in this country and in England (and hundreds more of like import can be found) to emphasize the fundamental rule of construction of statutes conferring upon corporations, either public or private, the power of eminent domain in respect to the matter of procedure. In the light of the decisions of this court, beginning with *Railroad v. Davis,* 19 N. C., 451, I concede that the Legislature may confer upon a corporation, having the right to condemn, the power to enter upon the land and subject it to the burden before compensation is made. In this opinion I do not care to controvert the proposition that power to enter may be conferred

even before the assessment of damage is made. For the purpose of this discussion, I fully concede the right, in as full and complete measure, as it is asserted in the opinion of the court. My dissent is based upon the construction of the statute. While I do not concede the necessity of invoking the rule, I insist that, in the light of authority and upon sound reason, the statute must be construed strictly and all reasonable doubt resolved in favor of the owner.

It is said that the power to condemn is political and not judicial, and from this proposition, which is conceded, the conclusion is reached that immediately upon the exercise of the power, by a declaration of condemnation, the right to enter upon and occupy the property is vested in the corporation without notice to the owner; that the institution of proceedings fixing the compensation and providing for the payment, is secondary both in point of time and importance. It seems to be conceded that the owner is entitled to some sort or kind of notice at this time. However this may be, the proposition, startling to the citizen who has been educated in the belief that he lives under a government of laws and not of men, has judicial warrant for its support. It would serve no good purpose to discuss the foundation of this power, which resides in all forms of government. In view of the fact that the power is conferred upon all sorts and kinds of corporations at every session of the General Assembly, it would seem wise to require a substantial, if not a strict compliance with the requirement of the statutes in regard to procedure by which the State parts with and delegates to others the exercise of this sovereign power, so vitally concerning the rights of the citizen and the honor of the sovereign.

The real question in this case is whether the charter of the town of Creedmoor confers upon the authorities the power to enter upon the property of the citizen until it is condemned, and whether it is condemned until the assessment

of damages is made by the persons and in the manner prescribed by the charter. Section 17, chapter 398, Private Laws 1905, being the charter of the town, provides that whenever it shall become necessary to condemn land for streets, the value of such land shall be assessed by "three freeholders of said town * * * one of said appraisers shall be appointed by the board of commissioners of said town, one by the landowner or his agent, and the third to be selected by the two so appointed." It is provided that the appraisers shall be sworn and shall file their report with the mayor within one week after the appraisement, etc. "Said report shall be signed by not less than two of the appraisers, and shall lie in the mayor's office for ten days and be subject to the inspection and examination of the landowner or his agent, and unless an appeal is taken, and such appeal shall lie to the Superior Court of Granville County in term time, during said period of ten days by the town or the landowner, the said land so appraised shall stand *condemned* for the use of the town, and the price fixed by the appraisers shall be fixed from the funds of the town."

It will be observed that no power is expressly conferred upon the officers of the town to enter upon the land and open a street. Of course such power is incident to condemnation and need not be expressly given.

I find in several charters granted to railroad companies in this State, the power to enter upon the land and construct the road before condemnation proceedings are instituted. Such power is given in the charter of the Raleigh & Gaston Railroad Company, which was before the court in *Railroad v. Davis, supra.* In the charter of the Wilmington & Raleigh, afterwards the Wilmington & Weldon Railroad Company, no such power is given; on the contrary, it is provided that if it be necessary to take land a petition shall be filed, etc.; after providing for the assessment of damages, etc., it is said that the corporation may "thereupon, and also if

no damage is due, enter upon the land and construct, etc." Power of entry to make surveys is given before condemnation. Section 49 of The Code, providing for the organization of railroad companies and prescribing the manner in which they shall proceed to condemn land, contains this language: "If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said company may enter, take possession of and hold said land, notwithstanding an appeal, etc. Section 1945. I note the provisions of these charters to show that when the Legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms.

In this case, it is found by the special verdict that the commissioners met on May 16, 1905, and adopted a resolution declaring that it was necessary and convenient for the public that a street be opened through the land of Rogers, appointing an appraiser on the part of the town and directing that the owner be notified to appoint an appraiser, and fixing the time at which they should meet and assess the damage. The owner was notified by the mayor. He declined and refused to select an appraiser. Thereupon, on May 24, 1905, the board of commisisoners selected a second appraiser to act with the one formerly appointed. The two selected a third appraiser, and the three persons thus selected went upon the premises and laid out the street, not in conformity to the resolution, and assessed the damages. They filed their report on May 25, 1905. At a meeting of the board on May 27, the report was adopted, and on the 29th the prosecutor gave notice of an appeal. The report stated that they had taken 250 feet of land; whereas the true quantity included in the street was 800 feet. On the 29th of May the defendants entered upon the land in the manner set forth in the special verdict.

The correctness of the judgment below depends upon the

answer to the question, whether the land stood condemned on the 29th of May; and the answer to this is dependent upon the question, whether by the resolution of May 16, 1905, the land stood condemned. It cannot be successfully contended that any right of entry was given in the charter until condemnation was had. It would seem that the plain language of the statute would put an end to the controversy. When the appraisers have been appointed, have acted, and the report of their action has been in the mayor's office ten days, eliminating the provision in regard to an appeal, "*the said land so appraised shall stand condemned,*" etc. The charter is the authority and the only authority by which the power is conferred, and by which its terms and extent are to be measured. How is it possible for the court to say that this language is of no effect. Was it not most natural for the prosecutor to put the only reasonable construction upon this plain language and to assert his ownership, until, by the law of the land, he has been divested of it? If the land stood condemned by the resolution, why should the Legislature have done a vain thing and declared that land already condemned should again "stand condemned?" If by the resolution of May 16, 1905, his land had been taken, it is immaterial for the purpose of this appeal to enquire whether the appointment by the board of two appraisers, when the statute empowered it to select only one, was authorized. If, on the contrary, the appointment and action of the appraisers are essential to the completion of the condemnation, it is important to enquire whether the refusal of the land owner to choose an appraiser, conferred the power on the board to do so. It is said that he was stubborn and by his stubbornness forfeited his right to have his property condemned according to the charter. The record does not disclose why the owner of the land refused to name an appraiser, nor is it of any moment in the decision of this case. It is sufficient to say, conceding that he was stubborn, this did not author-

ize the defendants to proceed otherwise than in accordance with the law, to take his property. Some of the most sacred rights of person and property have been preserved by men who were stubborn. Doubtless Hampden was so considered when he resisted the payment of ship money. We may not dismiss a man's cause because in our opinion he was stubborn. If those upon whom the Legislature has conferred the right to exercise the highest acts of sovereignty, fail to proceed according to the charter, the citizen not only has a right, but it is his duty to be stubborn.

I do not question the motives of the defendants. I presume they were acting in good faith. But when we deal with the sacred rights of person and property, nothing short of full and complete authority will justify.

In other charters directing the appointment of appraisers, as this does, provision is made for the appointment by the sheriff or clerk, if the owner of the property refuses to name an appraiser. It is no answer to the objection that the law has not been complied with, to say that it is the fault of the property owner. The charter is the guide for the corporation. The Legislature has prescribed the terms upon which and the manner in which the corporation must accept the authority; the citizen is not consulted; he is told that the condemnation of his property is the exercise of sovereign power, and he is not entitled to be heard. Certainly, when he finds that in delegating that power to a corporation, the Legislature has fixed the tribunal, provided for its selection and prescribed the manner in which his property is to "stand condemned," he may make this last stand for his rights, and should not be told that it is immaterial whether the corporation observes the provision of the charter. I respectfully, but firmly, insist that this is to dispense with fundamental principles founded upon the experience of the ages. I am at a loss to see what right the commissioners had to select two appraisers when the charter gave them power to select only

one. That the manner of selecting the appraisers when prescribed by the charter is essential, and compliance therewith, a condition precedent to condemnation is abundantly sustained by the authorities. In *Loucheim v. Hemsley*, 59 N. J. L., 149, the statute directs that the appraisers be of different political parties. The court said: "Neither in the communication nor in the minutes is any reference made to the statutory qualifications of the commissioners. This omission is fatal. A special authority delegated by statute to particular persons to take away a man's property and estate, against his will, must be strictly pursued, and must appear to have been so pursued on the face of the proceedings in which the authority is exercised."

In *Fore v. Hoke*, 48 Mo. App., 254, the statute required the petition for condemnation and assessment to set forth that the parties could not agree. The petition failing to do so, the court said that the averment was jurisdictional. In *Adams v Clarksburg*, 23 W. Va., 203, *Woods, J.*, says: "The taking of private property for public use, without the owner's consent can only be justified for the uses *in the modes upon the conditions and by the agencies* prescribed by law for its appropriation. Whenever the private property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. These conditions must be regarded as conditions precedent which are not only to be observed and complied with *before the right of the property owner is disturbed*, but the party claiming authority under the adverse proceeding must show affirmatively such compliance. All the authorities concur in holding, that as private property can be taken against the consent of the owner, only in such cases, and by such proceedings as may be specially provided by law, and as these proceedings are contrary to the course of the common law, and are in derogation of common right, they are to be

strictly construed and that the party who would avail himself of this extraordinary power, must comply fully with all the provisions of the law entitling him to exercise it." In this case a provision required ten days' notice to be served on the owners before the court could appoint the commissioners. The court held that a failure to give the notice rendered the proceeding void. This, because the statute required the notice. In *Madden v. L. & N. R. R.*, 66 Miss., 258, the statute provided that the commissioners be "disinterested." The court said: "This being the case, it is material to the validity of the *appropriation* that a strict compliance with the terms of the charter be apparent in the record. It nowhere appears, either in the appointment of the commissioners, in their return, or in any order entered therein that they were "disinterested." And if they were not, there has not been any condemnation of the land. This case was upon a "suggestion of error," re-argued, and the decision affirmed. In *Mitchell v. R. R.*, 68 Ill., 286, it is said: "It is a sound and inflexible rule of law, that when special proceedings are authorized by statute by which the estate of one person may be divested and transferred to another, every material provision of the statute must be complied with. The owner has the right to insist upon a strict performance of all the material requirements, and especially those designed for his security, and the non-observance of which may operate to his prejudice." In *Paret v. Boyonne*. 139 N. J. L., 559, *Depue, J.*, says: "The officers of a corporation are agents, with only special powers such as are delegated to them by the act of incorporation, or such as are necessarily implied from the powers delegated. * * * In the performance of these functions they are required to conform strictly to the method of procedure prescribed." In *Stewart v. Wallis*, 30 Barb., 344, it is said: "The form by which private property may be taken for public purposes, having been prescribed, it must be strictly pursued, or the attempt will be ineffectual and the

proceeding void, and all persons acting under the color of them will be trespassers." We may apply the words of the court in *Chi. & Alt. R. R. Co. v. Smith*, 78 Ill., 96, to all works of public character. "Whilst all persons at that day were desirous to see railroads constructed, it was not intended that it should be done at the sacrifice of all private rights. Those acting for the company knew, or should have known, that, in acquiring their right of way they were pursuing an extraordinary and summary remedy and, in doing so, the law imperatively demanded that they should observe all of the requirements of the statute under which they were acting. And this is a requirement which lies at the foundation of our system of jurisprudence." *Railroad v. Railroad*, 106 N. C., 16; 15 Cyc., p. 815. This is probably the first instance in which the property of the citizen has been taken against his consent, and its value fixed by appraisers, two of whom are selected by the party taking, they selecting the third. I submit that to sustain it is destructive of elementary principles of natural justice, and judicial procedure. It is no answer to say to the citizen deprived of his property at a valuation fixed by appraisers so appointed, that he may appeal. He is entitled in the first instance and at every step in the proceeding to demand a strict observance of the written law. The provisions in regard to the mode of procedure before the land shall "stand condemned," are not empty forms; to so construe them puts the State in the attitude of keeping the promise to the ear, and breaking it to the sense. Let us suppose a similar provision in the charter of a railroad company or telegraph company, in regard to the appointment of appraisers, and there is no difference in principle, would it be contended that, if the owner, feeling that his rights were being unlawfully or unjustly invaded, refused to name an appraiser, that a superintendent, or other officer of the corporation could name two of the appraisers, and say to the owner if he was not satisfied, he could appeal. I do not so understand the

guaranties which the law throws around the citizen. The right to appeal is of value and not to be denied, but the right of the citizen to demand at all stages of the proceeding, due process of law, is not to be denied or abridged.

The appeal suspended further action by the board. It is usually provided that if the corporation deposit the amount of the award, an appeal shall not suspend the right of entry. I see no reasonable objection to such a provision. It is said, however, that the question is settled by this court in *State v. Lyle,* 100 N. C., 497. The extent to which a question becomes closed, and is crystallized into positive law by a single decision binding upon the same court, is often difficult to define. Without undertaking to do so, I think it permissible and safe to say that it should not extend beyond the clear and unmistakable language of the judge who writes the opinion. I should feel myself bound, both by reason of my respect for the opinion of the learned Chief Justice who wrote, and the Associate Justice who concurred in that opinion, as well as the learned judge who tried the case below, unless my convictions were so strong, that to adopt the conclusion did violence to my sense of duty as a judge. I do not think that I am placed in this embarrassing position in respect to that case. Fully conceding that it is permissible to cite the case as in some measure sustaining the conclusion reached by the court, I think that a careful examination of the opinion discloses that the question upon which this case turns, is not considered or decided. *Smith, C. J.,* says: "The controversy in the present case turns upon the construction of the charter, which has been recited in full, and whether, in providing the method for ascertaining the compensation to be paid the owner, and the means by which it is to be done, a *prepayment* is necessary before the property can be taken, and this following the condemnation in the mode pointed out in the enactment." The discussion following this statement of the question in controversy, shows clearly that no other question was in the

mind of the writer. This view is strengthened by the concluding portion of the opinion—citing *Judge Cooley* to sustain the proposition that the corporation may, if authorized, take "*without first making payment.*" (Italics in opinion). This is the only question discussed or decided, and, as said, it is not controverted.

In *Freedle v. Railroad,* 49 N. C., 89, and in *McIntyre v. Railroad,* 67 N. C., 278, the question presented here did not arise. In *Johnston v. Rankin,* 70 N. C., 550, the charter of Asheville is not set out. The only point *decided* in respect to the right to proceed with the work, is that the law did not require compensation paid before the taking. If, as contended, these cases hold that, without clearly expressed power in the charter, a board of town commissioners, or directors of a private corporation may, without notice to the owner, locate a street or road on his property, and immediately, without other notice to him than the appearance of a number of men on his premises, tear away his houses and fences, cut down his trees and take his property, then I most respectfully but earnestly dissent from them. To sustain the exercise of such arbitrary power, there should be unmistakable language used in the statute. How far the Legislature may permit it, is not, in my opinion, a closed question.

It may be said that it is of little importance to the owner, whose property is taken by an *ex parte* exercise of political sovereignty, either by a board of town commissioners or a board of non-resident directors of a corporation, to whom has been delegated this sovereign power, how, when or by whom the assessment is made; and it must be conceded that much judicial warrant is found to sustain the position. I cannot hope to change the current of judicial thought in this court, and it is doubtless a vain assumption on my part to question its correctness. I hope, however, that another department of the government, to which it seems the citizen must look to safeguard his rights in this respect, will come to a state of

mind which will enable us to say, in the language of the English Court of Chancery, "the hardship imposed on individuals, I think, and I am glad to think, has of late years been subject to a more anxious consideration than it used to be." The material wealth and prosperity of the country should, and we hope will, continue to grow. The great principles by which the security of life, liberty and property has been preserved, the preservation of which is so essential, and has contributed so largely to the present happy condition in which we live, may not be either sacrificed or in the slightest degree weakened by the demands of corporations, either public or private, to trespass upon the land of the citizen, otherwise than is permitted by the clearly expressed will of the law-making power. A man's land should "stand condemned" when, and only when, every step, which the law prescribes to that end, has been taken. Every reasonable doubt should be resolved in favor of the citizen. It is well known that charters are obtained by those most interested in securing the largest delegation of power possible. The owner, whose property is to be condemned, has no opportunity to be heard. The constitutional provision requiring notice of the introduction of private laws, has, by custom and construction, been practically abrogated.

Holding, therefore, that the assessment was of the essence of the condemnation proceeding, I am forced to the conclusion that the land did never "stand condemned" because there was never any lawfully constituted appraisers, and that the report should not under the terms of the charter be confirmed, until the expiration of ten days. It would seem also that power is ever aggressive and often indifferent to individual rights.

Recognizing these truths taught by experience, the courts have wisely declared that all grants of power are to be construed strictly against the grant, and liberally in favor of the citizen.

In my opinion, under the clear terms of the charter, the land of the prosecutor did not "stand condemned" on May 29, 1905, and the entry thereon by the defendants was a trespass.

There are other phases of the case which I do not care to discuss. I do not dissent from what is said in regard to notice given.

STATE v. JOHNSTON.

(Filed November 22, 1905).

Intoxicating Liquors—What Constitutes a Sale.

An agreement to deliver one-half gallon of whiskey, entered into by the defendant in a city where the sale of liquor is prohibited, and receipt of the agreed price and delivery of the whiskey by the defendant within said city in pursuance of the agreement, constitute a sale of liquor upon the part of the defendant within the prohibited territory.

INDICTMENT against Monroe Johnston for retailing spirituous liquors without license, heard by *Judge C. M. Cooke* and a jury, at August Term, 1905, of the Superior Court of MECKLENBURG County. Upon the special verdict set out in the record, His Honor held that the defendant was not guilty. The solicitor for the State prosecutes this appeal.

Robert D. Gilmer, Attorney-General, for the State.
Stewart & McRae for the defendant.

BROWN, J. It is unnecessary to set out the lengthy special verdict. It appears therein that the sale of liquor is prohibited in the city of Charlotte, and was on July 15, 1905; that on the evening of July 15, 1905, Tom Brown, between the hours of 6 and 7 o'clock P. M., near the Southern depot in

the city of Charlotte, Mecklenburg County, North Carolina, met the accused, Monroe Johnston. The said Monroe Johnston told him that he was going to Salisbury, and wanted to know if he wanted any whiskey. Tom Brown told him that he wanted a half gallon of whiskey. Monroe Johnston, the prisoner, agreed to bring him one-half gallon from Salisbury, for which he paid Monroe Johnston one dollar. That he was not to pay Monroe Johnston anything towards his fare to Salisbury and return. It further appears that on next morning defendant delivered to Tom Brown, in pursuance of his contract, the half gallon of whiskey within said city.

In the view we take of this case, it is unnecessary to discuss the question of agency and the other legal aspects of the case, so ably and elaborately presented by the Attorney-General in his argument and brief. We think the facts set out in the special verdict plainly disclose an agreement or contract to deliver to Tom Brown one-half gallon of whiskey, entered into in the city of Charlotte on July 15, by the defendant and a receipt of the agreed price—also a delivery of the whiskey by the defendant the next morning, in pursuance of the agreement. These facts constitute a sale of liquor upon the part of the defendant within the prohibited territory. The Superior Court should have adjudged the defendant guilty.

Let the case be remanded with instruction to proceed to judgment.

Reversed.

STATE v. HOLLOMAN.

(Filed December 12, 1905).

Roads and Highways—Method of Working—Power of Legislature — License Taxes — Board of Supervisors — Penalties.

1. Chapter 259, Laws 1905, prescribing a method for working the roads in Hertford County and providing in section 17 thereof that any person desiring to use the roads of a township for the carrying on of his business of hauling mill logs or other heavy material with log wagons or other heavy vehicles, shall first obtain a license by paying an annual license tax to the board of supervisors, and further providing that any person violating this section shall be guilty of a crime and liable to a penalty, deprives no citizen of any right to use the highway. It does not restrain trade, nor is it oppressive, but exceedingly equitable.

2. Where, under the authority of section 23, providing that section 17, above set out, shall not be enforced by any township unless a majority of the board of supervisors of that township shall vote to enforce it, a majority of the board of a certain township adopted the provisions of section 17, the defendant cannot avail himself of the fact that no written notice of the action of the board was served upon him, as the law did not require written notice and it appears that he had verbal notice.

3. The Legislature can provide a special road law and method of working the public roads for a county, or several counties, or a township or other locality, and make the adoption of such systems depend upon the acceptance or rejection thereof by the people or the landholders, or by the official board of such county, township or locality.

4. The license tax provided for in Laws 1905, chap. 259, is simply a mode of regulating the use of the public roads and requiring that those desirous of using them, for extraordinary purposes, as hauling heavy lumber and logs over the roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege.

5. The Legislature has complete power to regulate the highways in the State and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and the preservation of the roads, and this power may be conferred upon local governing agencies and its being put into effect can be made dependent upon the action of the board of supervisors.

6. It is for the Legislature to prescribe by what methods the roads shall be worked and kept in repair,—whether by labor, by taxation of property, or by funds raised from license taxes, or by a mixture of two or more of these methods—and this may vary in different counties and localities.

7. Under Laws 1905, chap. 259, the State prosecutes for the misdemeanor and the board of supervisors can sue for the penalty.

INDICTMENT against Luther Holloman for an unlawful use of the public roads, under sections 17 and 23 of chapter 259, Public Laws of 1905, relating to the highways of Hertford County, heard by *Judge R. B. Peebles* and a jury, at the Fall Term, 1905, of the Superior Court of HERTFORD County. From a judgment of not guilty upon a special verdict, the solicitor for the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

CLARK, C. J. The General Assembly, Laws 1905, chap. 259, prescribed a carefully drawn method for working the public roads in Hertford County. Section 17 thereof provides: "That any person, firm or corporation desiring to use any of the public roads of a township for carrying on his or its business of hauling mill logs or timber or other heavy material with log wagons, log carts or other heavy vehicles shall first obtain a license for this purpose from the board of supervisors of the township in which he or they may desire to operate and make use of the roads, by paying an annual license tax of fifteen dollars for each wagon or cart or vehicle of the kind above described to be used, which tax shall

be paid to the treasurer of the board fund and placed to the credit of the board of supervisors of the township, to be used by the board as other funds for said township. Any person violating this section shall be guilty of a crime and liable to a penalty of fifty dollars, to be recovered in an action by the board of supervisors of roads of the township where the offense took place, for the benefit of the road fund of that township." And section 23 provides: "That section 17 of this act shall not be enforced in any township unless a majority of the members of the board of supervisors of that township shall vote to enforce the same." Section 12 authorizes the levy by the county commissioners of a county tax on property for road purposes, such tax to be used in the township from which it is derived, and section 24 provides that one-half the net proceeds of all dispensaries for the sale of liquor in the county shall be apportioned *per capita* among the several townships and used by the board of road supervisors of each township to be used solely for repairing the public roads therein.

The special verdict finds that the majority of the justices of Murfreesboro township on 3 June, 1905, under authority of section 23 of said act, adopted the provisions of section 17, above set out, and imposed the license tax of $15 upon all persons or corporations using the roads of said township for carrying on their business of hauling mill logs or timber or other heavy material with log wagons, log carts and other heavy vehicles, and that the defendant had verbal notice both from a justice of the peace and member of the board of road supervisors of said township, and also from the secretary of said board, of such action, and that the law was in force requiring a license tax of $15, but the defendant nevertheless continued the business of hauling logs over the public roads in said township with log wagon and team after having received the verbal notices aforesaid, without taking out license or paying the license tax, until

later upon receiving written notice that the board had refused to rescind the order, he discontinued using the public roads for hauling logs with log wagons.

As the law did not require written notice of the action of the board under section 23, the defendant cannot avail himself of the fact that no written notice was served upon him. The special verdict finds that he had notice that the law had been put in force in said township by virtue of the authority conferred by section 23 of the act, above set out. The public roads are for ordinary use, and it is common knowledge that when used by heavy vehicles hauling heavy logs and timber over them, the roads are cut up and require an extraordinary expenditure to be kept in order. The general public might well complain at being called upon to bear this additional expense for the profit of the lumber companies using the road, not for ordinary travel and usage, but for their individual benefit, not as members of the community, but in the prosecution of a special and usually temporary but profitable business.

That the General Assembly can provide a special road law and method of working the public roads for a county or several counties, or a township or other locality, and make the adoption of such system depend upon the acceptance or rejection thereof by the people or the land holders (as with "no fence" laws), or by the official boards of such county, township or locality, is well settled. This is the flexible "local option" system which gives the greatest freedom of local self-government, and has been applied already to the sale of liquor, to fence laws, to the sale of seed cotton, to cattle running at large, to variations in the methods of electing town commissioners and in the mode of selection of county commissioners, to local provisions for public schools, to dispensaries, to close season for game, to this very matter of working the public roads, and in many other

instances. *State v. Sharp,* 125 N. C., 632, and cases there cited.

This license tax is simply a mode of regulating the use of the public roads and requiring that those desirous of using them for extraordinary purposes, as hauling heavy lumber and logs over the roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege. This statute prescribes that the license tax shall be "placed to the credit of the board of supervisors of the township, to be used by the board as other funds for said township." As all the funds of each board of road supervisors are to be used "solely for road purposes in its township," the evident purpose is to use these license taxes to make good the extra cost of road maintenance entailed by the use of the public road by heavy vehicles in hauling heavy logs and timber by these lumber companies and others.

In *State v. Yopp,* 97 N. C., 477, it was held that: "The Legislature has complete power to regulate the highways in the State and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and the preservation of the roads." This power may be conferred upon local governing agencies. Elliott R. & S. (2nd Ed.), sec. 424; *State v. Summerfield,* 107 N. C., 895. And its being put into effect can be made dependent upon the action of the board of supervisors. *State v. Barringer,* 110 N. C., 525; *State v. Chambers,* 93 N. C., 600.

This statute deprives no citizen of any right to use the highway. It does not restrain trade, nor is it oppressive. Heavily loaded vehicles cut up and injure the public road and a reasonable license tax, the proceeds of which are appropriated to repairing the damage thus produced, is exceedingly equitable.

The method of providing for working and keeping in re-

pair the public roads is a matter solely for the legislative department. The old system of working the roads by conscription of labor was exceedingly inequitable, because it threw the cost of road maintenance upon those deriving the least benefit therefrom—the laboring element. This system was handed down to us by our British forefathers, in whose government that class had small voice, if any, in the adjustment of public burdens. It was a part of the *trinoda necessitas* under the Roman law, and in France, where that system of working the roads was known as *corvees,* it was one of the great grievances which found utterance in the great French Revolution and was swept away. *State v. Covington,* 125 N. C., 644. The change to working the roads by taxation has been complete in most civilized countries, but has been slower in this State than in most. This is fairer than working by compulsory labor, but is far from being entirely equitable, since the taxable property of individuals rarely bears direct proportion to the benefits received from the use of the public roads. An ideal tax probably would be one proportioned to the benefits received by each, but this would be evidently impracticable. The license tax here imposed for raising a fund to be paid by those making extraordinary use of the roadways, to be applied to repairing the extra wear and tear of the roads caused thereby, is an approximation to the just rule of taxation for roads in proportion to benefits received.

In many other States there has been similar legislation which has been upheld by the courts. The cases presenting the question are mostly those in which there has been an abatement of the road tax in consideration of the use of broad tires, an abatement granted by reason of the lessened wear and tear of the roads when those are used. *People v. James,* 16 Hun., 426; *Utica v. Blackeslee,* 46 How. Pr., 165; *Gartside v. East St. Louis,* 43 Ill., 47; s. c., 70 Mo., 562; *Brooklyn v. Breslin,* 57 N. Y., 591; *Nagle v. Augusta,*

5 Ga., 546; *Com. v. Mullhall,* 162 Mass., 496; *Harrison v. Elgin,* 58 Ill., App. 452, and others.

It is for the legislative department to prescribe by what methods the roads shall be worked and kept in repair—whether by labor, by taxation on property, or by funds raised from license taxes, or by a mixture of two or more of these methods—and this may vary in different counties and localities to meet the wishes of the people of each, and can be changed by subsequent Legislatures. This matter has been fully discussed. *State v. Sharp,* 125 N. C., 632, 634.

Under this statute, the State prosecutes for the misdemeanor and the board of supervisors can sue for the penalty. *State v. Parker,* 91 N. C., 650; *State v. Bloodworth,* 94 N. C., 918; *State v. Taylor,* 133 N. C., 755; *School Directors v. Asheville,* 137 N. C., 510.

Upon the special verdict the court should have instructed the jury to find the defendant guilty.

Reversed.

ADDRESS OF WILLIAM P. BYNUM, JR.,

Presenting the Portrait of Thomas Settle to the Supreme Court, November 7, 1905.

May It Please Your Honors:

An eminent lawyer in a recent address has truly said that every declaration by a court of the unconstitutionality of a statute is a test of the loyalty of the people to the majesty of the law, and the acquiescence of the people is a magnificent tribute to the judiciary. The people pay this tribute, in his opinion, because of the acknowledged power of the courts vested in them by the Constitution. "The Constitution rests upon public opinion, and in matters pertaining to law, public opinion rests upon the opinion of the bar, and the bar recognizes and sustains the authority of the courts. The judiciary," he declares, is therefore "the strongest department of our government. It is the most permanent. It has amplified its power and jurisdiction. It was never stronger than today."

The Supreme Court of North Carolina, from its organization nearly ninety years ago, has justly held the respect and confidence of the people more steadfastly than any other branch of the state government. This is due not only to its power and its exalted function as the head of one of the great departments of government established by the constitution, but in an especial sense to the character and achievements of the thirty-eight judges who, during that period, have been members of this court. Coming from the different walks of life, with varied talents and experience, they have performed the duties of their office with that uniform wisdom and fidelity which have endeared them to the state and justly entitled them to be numbered among the great builders and interpre-

ters of our law. Their splendid services need not be recounted here. The record and result of their labors may be read in the decisions of this court, the judicial chronicles of their time, and their names will be revered as long as the profession which they ennobled shall endure.

What stranger, even, entering this hall and beholding the faces which adorn its walls, does not realize that he is in the presence of extraordinary men? He finds not here the stern countenance, the severe eye, of the typical judge of old, but a company of gentlemen whose dignified and scholarly, yet mild, benignant features show clearly the warm heart, the broad, charitable spirit of just, magnanimous men—judges who were not feared, but loved.

Into this splendid company of the dead, and their worthy successors, the living, the portrait of Thomas Settle today is brought by his devoted children and presented to the court that it may take its place in this stately gallery of our judges. Elevated to the bench at the age of thirty-seven, the youngest judge that ever sat in this court, his term of service altogether was seven years and his qualities of mind and heart were such as to endear him throughout not only to his associates on the bench, but to the bar generally, and won for him the admiration and affection of all who knew him.

The family to which he belonged is of pure English origin. Near the middle of the eighteenth century his great-grandfather, Josiah Settle, came from England and established a home in the borders of this state in the beautiful region along the foot hills of the Blue Ridge in what is now Rockingham County. He was one of a colony of men who, as Bancroft says, came "from civilized life and scattered among forests—hermits with wives and children, resting upon the bosom of nature in perfect harmony with the wilderness of their gentle clime. Careless of religious sects or unmolested by oppressive laws, they enjoyed liberty of conscience and personal independence, freedom of the forest and of the river. The children of nature listened to the inspira-

tions of nature. They desired no greater happiness than they enjoyed."

The scenery, soil and climate of that locality were all that could be desired by the early emigrant and there among the hills of the Dan came many whose descendants have made honorable records in the service of the state. In that favored region the Settle family lived for more than a hundred years—first Josiah, then David, then Thomas, father of him of whom I speak, who was born in Rockingham, March 9, 1789. The family even in those days possessed ample means and the graces and comforts of life. Thomas Settle, the elder, was liberally educated and by nature generously endowed. He became a lawyer and was successful in his practice. In 1816, at the age of twenty-seven, he was elected a member of the House of Commons where he served with dignity and ability. The next year he was the Whig candidate for Congress in the district composed of Caswell, Rockingham, Guilford and Stokes, and was elected, succeeding Bartlett Yancey, Democrat, as the representative of that district in the Fifteenth Congress. At the expiration of his term he was re-elected and served until 1821 when he declined re-election and was succeeded by Romulus M. Saunders.

Mr. Settle then returned to the practice of his profession and to the ease and dignity of a retired life which he much preferred. But in 1826 he was again called to the public service and for three successive years was a member of the House of Commons of which, from a number of able Whigs, he was chosen speaker at the session of 1828. In the General Assembly and among the people considerable political excitement then prevailed. It was the year of General Jackson's first election to the presidency and marked the beginning of a new era in the political history of the country. The hostile feeling generally prevalent against the Bank of the United States showed itself here also against the banks of the State. They were

the State Bank of North Carolina, the Bank of New Bern, and the Bank of Cape Fear. Judge Ruffin was president of the first and William Gaston of the second. It was claimed that the stock of these banks had not been paid for as required by their charters; that they had issued more bills or notes than they were authorized to issue and had refused to pay them in specie on demand; that their debts exceeded the amount limited by law; that they had dealt and traded in articles other than those authorized; had charged usurious interest, bought and speculated upon their own paper and were in the habit of exacting exorbitant charges as conditions of discounting. By these and other practices it was alleged that they had drawn from the people a profit of about four million dollars on their stock, three-fourths of which, it was claimed, had been issued in a fictitious and fraudulent manner; and that having received from the people this sum, exceeding four times the amount of actual capital paid into the banks according to law, they still held the notes of the people for more than five million dollars, about four times the amount of the circulating medium of the state. Thus it was claimed that it was in the power of these banks to extinguish absolutely the currency of the state and still hold a debt against the people of about four million dollars. And this, it was urged, the banks were threatening to do; that having for years continued by illegal practices to draw from the people the profits of their labor, thus reducing them to such an impoverished condition that they could no longer pay their exorbitant demands, these grasping institutions, their accusers declared, were now preparing to extort from the people their actual means of subsistence. By reason of these practices it was insisted that the banks had forfeited the powers and privileges granted in their charters.

The subject was discussed in the governor's message and a joint select committee of eighteen was raised to whom the whole matter was referred. Robert Potter of Granville was

chairman. Mr. Gaston was named a member of the committee but declined to serve on account of his connection with one of the banks under investigation. Other prominent members were David L. Swain of Buncombe, James H. Ruffin of Caswell, George E. Spruill of Halifax, and George C. Mendenhall of Guilford. A majority of the committee, including the members named, examined the banks and their officers and recommended merely the passage of a law imposing a penalty on all banks of the state which after a certain day refused to pay specie on demand for their notes. The minority, however, led by Potter, reported a resolution, followed by a bill, declaring that the banks had violated and forfeited their charters and directing the Attorney-General forthwith to institute a judicial inquiry into their conduct and to prosecute such inquiry by writ of *quo warranto* or other legal process. The bill was a drastic measure virtually confiscating the property of the banks, providing for the appointment of commissioners or receivers to wind up their affairs and for the arrest and prosecution of their officers before the Supreme Court. The debate on the bill was able and acrimonious. Its leading advocates were William J. Alexander of Mecklenburg, Charles Fisher of Salisbury and Jesse A. Bynum of Halifax. Potter himself, the author of the bill, made many speeches in support of it. The debate in opposition was opened with a dignified, convincing argument by Mr. Gaston, who was followed by George E. Spruill, David L. Swain, H. C. Jones of Rowan, and Frederick Nash of Orange, on the same side. The question on the third reading was "loudly called for" and being taken by *ayes* and *noes,* fifty-nine votes were cast for the bill and fifty-eight against it. The speaker, Mr. Settle, was thus placed in a situation of great responsibility but did not seek to evade it. Declaring his belief that the bill should not pass, he promptly placed his vote with those of the minority and thus the bill was lost.

The sequel proved that the speaker was right. The at-

tack on the banks was due largely to their suspension of specie payments, a condition which for several years after the War of 1812 prevailed in all banks south of New York. To have passed the bill would have destroyed the banks and this in turn would have destroyed public confidence and resulted surely in financial disaster and distress.

The three succeeding years were spent by Mr. Settle at his home in Rockingham in the practice of his profession and in attending to his farming interests which were extensive. He was never fond of the animosities of active political life and resolutely rejected all solicitations looking to further political preferment. He was soon called, however, to a service more congenial to his disposition and tastes. In 1832 he was elected judge of the Superior Courts of Law and Equity and spent nearly all the remainder of his life in that office, resigning in 1857, the year of his death, after twenty-five years of faithful, efficient service.

Judge Settle was a man of fine sense, simple manners and dignified, courtly bearing. He was regarded as an upright, able, conscientious lawyer, a wise, patient, urbane judge, and a lovable Christian gentleman. A correct estimate of his life and character may be derived from its influence on those around him. Among his law students were Alfred M. Scales and John M. Morehead, both afterwards governor of the State, the one a brave general, the other the great constructive statesman of North Carolina.

Like the Moreheads Judge Settle was an old-line Whig with free soil proclivities. He believed that slavery was wrong and should be abolished by gradual emancipation under proper regulations and with fair compensation provided by law, the course so earnestly urged by Mr. Lincoln in 1862.

During his long service on the bench he tried many important cases and always with the utmost patience and impartiality. "Four things," said Socrates, "belong to a judge: to hear courteously, to answer wisely, to consider

soberly, and to decide impartially." These were Judge Settle's characteristics.*

From 1826 to his death he was a trustee of the University of this state where his sons were educated. He was a devoted member of the Baptist church and for many years a trustee of Wake Forest College. Dying at the age of sixty-eight, half of his entire life was spent in the public service and not a word of calumny was ever uttered against his name.

Judge Settle was fortunate in his marriage. Henrietta Graves, who became his wife, belonged to a family eminent for its sturdy moral and intellectual qualities. Her father, Azariah Graves, was a prominent citizen of Caswell County which for seven consecutive years he represented in the state senate. Her brother, Calvin Graves, was a member of the constitutional convention of 1835 and later a member of the House of Commons for three years and of the senate for two, where by his courageous action as speaker the bill for the construction of the North Carolina Railroad, a measure of the utmost importance for the internal improvement and development of the state, finally became a law.

Thomas Settle and Henrietta Graves were rich enough and happy enough in the possession of their children. Married September 21, 1820, they spent their lives in the country at their hospitable home in Rockingham County. Two

*In April, 1828, at Salisbury, James I. Long handed Richmond M. Pearson a challenge from Thomas J. Green to fight a duel. The trouble arose from Pearson's denunciation of Green for language reflecting on the character of Mrs. Adams, wife of the President. Mr. Pearson informed Mr. Long that he "bore a challenge from a scoundrel," and while he would not notice Green, if Long felt in the least affronted, he would answer any call *he* might make. Mr. Long then challenged Mr. Pearson, the challenge was accepted and the necessary arrangements made. Before the meeting, however, Long was bound to the peace in another matter and he raised the question whether, if he and Pearson should fight in another state, it would forfeit his bond. It was agreed that this question should be referred to "two disinterested lawyers of standing," and if their opinion was in the affirmative, "the matter should not be urged further for the present." The lawyers selected were John M. Morehead and Thomas Settle. Their written opinion answered the question in the affirmative and the matter was ended.

sons and five daughters constituted the family. Two of the daughters, Elizabeth and Rebecca, died in girlhood; one, Henrietta, became the wife of David S. Reid, afterwards governor of the state and one of its senators in Congress; another, Caroline, married Hugh Reid, Esquire, brother of the governor and a highly useful citizen of Rockingham; and the third, Fannie, married Col. J. W. Covington, a gentleman of wealth and prominence from Richmond County, and after his death the Honorable Oliver H. Dockery, of this state. All except Mrs. David S. Reid and the youngest child, Col. David Settle of Wentworth, are dead.

The devotion of these parents to their children was beautiful. I have read some of the letters of the father and mother to their sons—letters full of wise counsel, unselfish devotion and the tenderest solicitude for their proper guidance and protection. They were justly proud of their family and its connections, and seldom has one less numerous possessed more interesting characters. Among its members and immediate connections were two United States senators, four members of the House of Representatives, three judges, a governor of the state, a formidable candidate for the presidency, and many others of distinguished virtues and ability.

Thomas Settle, the second of that name and fourth child of Thomas Settle and Henrietta Graves, was born in Rockingham County, January 23, 1831. He received his academic training at the excellent school of Samuel Smith near Madison. He was educated at the University where he was graduated with distinction in 1850 at the age of nineteen. There he devoted himself with much avidity to general reading and the exercises of his literary society, the Dialectic, and was less attentive to Latin, Greek and mathematics, the chief studies of that day. Hence he was a capital debater and a popular society leader and was honored with all the offices from president down. In his graduating address he made a marked impression. His ideas were clear, his manner animated and forcible, his appearance handsome,

gracious and commanding. The year of his graduation David S. Reid, his brother-in-law, was elected governor of the state and the young graduate made his entrance into political life as private secretary to the governor. Here he formed the acquaintance of many eminent men who were pleased by his courtesy and affability and whose example stimulated his ambition for an honorable career.

He was then in his twenty-first year. His early associations had fostered a love of politics. The honorable record of his father in Congress, in the legislature and on the bench; the popularity of Governor Reid, then in the full tide of his phenomenal career; his own inclinations and surroundings as well as the very spirit of the times strengthened his preference for active participation in the political struggles and contentions of the time. The war with Mexico had lately added to the public domain a large territory north and south of the line fixed by the Missouri compromise, and thus revived more bitterly than ever the question of the extension or the restriction of slavery. The Whig party to which his father belonged had won its last victory in the election of General Taylor three years before and was already showing signs of early disintegration. Free-soil Whigs and free-soil Democrats already had their representatives in Congress voicing the aggressive purposes of a new and more radical party. The Democrats of the South were maintaining the constitutional right to take slaves, as any other property, into the territories and to be protected therein by the laws of Congress, a doctrine later affirmed by the Supreme Court of the United States. The free-soil Whigs and Democrats of the North, on the other hand, declared the common domain to be devoted to justice and liberty not only by the Constitution, but by a law higher than the Constitution, and avowed their conviction that slavery must give way "to the salutary instructions of economy and to the refining influences of humanity;" while the Abolitionists, with their bitter contempt for the compromises of Congress and the Con-

stitution and their ruthless programme of abolition with or without constitutional warrant, were ready for a separation from the South should abolition prove impossible. To allay these fierce antagonisms and if possible save from disruption his party and the country, Henry Clay had come forward the year before, with the dignity of age upon him, to urge measures of compromise. Disheartened at the hopeless outlook, but abating nothing of his conviction that the federal government was supreme and must be obeyed, he had put away his old-time imperiousness and pleaded as he had never pleaded before for mutual accommodation and agreement. Mr. Webster slackened a little in his constitutional convictions and also urged compromise and concession at the risk of his own political existence. Mr. Seward for the free-soil Whigs and Mr. Chase for the free-soil Democrats repudiated all compromise and denied the possibility of any equilibrium between the sections. The President himself opposed the compromise and exerted the influence of the administration against it. But the President was removed by death and the measures as urged by the committee of Congress were passed and approved by his friendly successor. California was admitted as a free state; Utah and New Mexico, including all the remainder of the Mexican cession, were organized as territories without restriction as to slavery; the boundary line of Texas was adjusted; a stringent fugitive slave law was enacted and the buying and selling of slaves in the District of Columbia was prohibited. The first and fifth of these enactments were to satisfy the North; the second and fourth were to pacify the South. They were passed chiefly by southern votes and framed to meet the demands of southern men and to obviate every reasonable southern objection. Free-soilers and many Whigs of the North opposed them on the ground that they were a surrender to the slave power; extreme Democrats of the South opposed them because they believed them a waiver of the right

to take slaves into the new territories and be protected in their ownership as of any other property.

In the main, however, both of the great political parties loyally supported the compromise and seemed to believe that the slavery question had been settled by it. Their platforms of 1852 contained strong assertions of their complete acceptance of those measures and their determination to take them as a final settlement of the struggle between the slave and the free states. Thousands of Whigs in the North, alienated by the efforts of the party thus to ignore the great question of slavery and its failure to take up boldly the cause of liberty, left its ranks or refused to vote; while many of its southern members, especially the younger ones, dissatisfied or repelled by its wavering policy, showed little interest for its success. Before election day Mr. Clay and Mr. Webster, its two great leaders and the champions of the compromise, had passed away and the party received its death blow in the election of Franklin Pierce.

In this situation it was not unnatural that Mr. Settle, after reaching his majority in 1852, should have departed from the political faith of his father and like many southern young men of that day allied himself with the Democratic party. A controlling reason also was his belief in free suffrage, the popular Democratic doctrine on which his kinsman, Governor Reid, had recently been elected. Two years later he received his license to practice law. He had studied under Judge Pearson at Richmond Hill and it was during those days that he first met Mary Glenn who afterwards became his wife. The same year his love of debate and the allurements of political life led him to look with favor upon the solicitations of his party friends to become a candidate for the House of Commons from Rockingham County. His popularity assured his election and for five successive years, 1854 to 1859, he was an accomplished member of that body, and the latter year was chosen its Speaker. His service in the legislature increased his knowledge and his love of politi-

cal affairs and gave him the reputation of an astute political manager and debater. Accordingly in 1856 he was placed on the national Democratic ticket as elector for his district and cast the electoral vote of the state for Mr. Buchanan.

A Democrat, born and reared in the South, firm in his advocacy of southern rights, Mr. Settle was an ardent supporter of the Constitution, a staunch believer in the Union, and opposed to secession in any form so long as the Constitution and the laws enacted by its authority could be upheld and obeyed. Consequently when later the expediency of withdrawing from the Union became involved in the presidential contest of 1860, he wisely advocated the election of Mr. Douglas as the surest way to forestall that calamity.

But the controversy between the North and the South could not be settled by the ballot. The cause of it was too deep-seated to be reached by that peaceful remedy. It remained one of those unsettled questions which have no pity for the repose of nations. Mr. Lincoln's election alarmed and angered the South. Despite his majority in the electoral college, he had received little more than one-third of the votes cast by the people and they came entirely from the northern states. His triumphant party was led by many whom the South regarded as her bitter enemies as well as deliberate violators of the Constitution and the laws of Congress which had been enacted to protect the rights of southern men. Those laws, though upheld by the Supreme Court, were frequently disregarded in the North. The court itself was ridiculed and denounced by northern abolitionists and Republicans, and the Constitution—the supreme law of the land—was held to be binding and entitled to respect only when it conformed to their ideas of justice and right. One of the prime objects of the government established by our forefathers had been to insure domestic tranquility. That condition had not prevailed in the United States for many years and the prospect was now no better. In spite, therefore, of their love for the Union and its Constitution which

the people of the South had shown from the beginning, many of them sincerely believed and were determined that, rather than suffer the imposition, the humiliation of remaining in a government whose Constitution and laws were disobeyed at will, they would withdraw from it and form a government of their own. The question with them was not so much the retention of their property in the slave: they were tired of northern criticism, and, as they conceived, of northern insult and wrong. The accusation of moral guilt in the matter of slavery had stung them most intolerably. "They knew," says Woodrow Wilson in his *History of the American People*, "with what motives and principles they administered slavery, and felt to the quick the deep injustice of imputing to them pleasure or passion or brutal pride of mastery in maintaining their hold upon the slaves. Many a thoughtful man amongst them saw with keen disquietude how like an incubus slavery lay upon the South; how it demoralized masters who were weak, burdened masters who were strong, and brought upon all alike enormous, hopeless economic loss * * * That very fact, their very consciousness that they exercised a good conscience in these matters, made them the more keenly sensitive to the bitter attacks made upon them at the North, the more determined now to assert themselves, though it were by revolution, when they saw a party whose chief tenet seemed to be the iniquity of the South about to take possession of the Federal government. Probably not more than one white man out of every five in the South was a slaveholder; not more than half had even the use or direction of slaves. Hundreds of the merchants, lawyers, physicians and ministers, who were the natural ruling spirits of the towns, owned none. But the men who were slaveowners were the masters of politics and of society. Their sensibilities were for all practical purposes the sensibilities of the South; and for close upon forty years now it had seemed as if at every turn of the country's history these sensibilities must be put upon the rack. The Missouri compromise of

1820 had treated the institution of slavery, which they maintained, as an infection to be shut out by a line as if of quarantine. The alarming insurrection of the slaves of southeastern Virginia under Nat Turner in 1831; the English Act of Emancipation and the formation of the American Anti-Slavery Society in 1833; the slow and dangerous Seminole War, which dragged from 1832 to 1839, and was as much a war to destroy the easy refuge of runaway and marauding negroes in Florida as to bring the Indians, their confederates, to submission; the critical Texas question; the Mexican War and the debatable Wilmot Proviso: the Kansas-Nebraska Act, the 'free-soil' campaign, the break-up of the Whigs and the rise and triumph of the Republicans: it had been a culminating series of events whose wounds and perplexities were always for the South. Southerners might have looked upon the election of Mr. Lincoln as only a casual party defeat, to be outlived and reversed, had it not come like a dramatic *denouement* at the end of the series. As it was, it seemed the last, intolerable step in their humiliation."

South Carolina took the first step in December following the election and Mississippi, Florida, Alabama, Georgia and Louisiana followed in the order named. By the 18th of February, 1861, a Confederate government had been formed at Montgomery and its president and vice-president inaugurated amid scenes of the wildest enthusiasm. April the 12th Fort Sumter was bombarded and in two days it surrendered. The President of the United States issued his call for troops and the President of the Confederate States prepared to meet them. North Carolina, Virginia, Arkansas and Tennessee still remained in the Union but their governors refused to respond to Mr. Lincoln's call, holding that a state had the right to withdraw from the Union and could not rightfully be compelled to return. Virginia yielded to her southern sympathies in April, Arkansas early in May, and both promptly joined the Confederacy, leaving North Carolina and Tennessee still in the Union and still

hoping that the united efforts of patriotic men in every part of the nation might avert the dangers threatening it and again unite the states in a common bond of fraternal and perpetual union.

The decisive action of South Carolina in withdrawing from the Union in December and the certainty that the states south of her would follow, at once disclosed to the people of North Carolina that they must decide the momentous question whether this state would go with those of the South or remain with those of the North. This perilous condition, in the judgment of the General Assembly then in session, demanded a convention of the people to effect, if possible, as it declared, "an honorable adjustment of existing difficulties whereby the Federal Union was endangered or otherwise to determine what action would best preserve the honor and promote the interests of North Carolina." Accordingly an act was passed January 1, 1861, requiring the governor to cause an election to be held in the several counties of the state February 28 following, to determine whether such convention should assemble and at the same time to choose one hundred and twenty delegates who should compose its membership. The real question was not so much the right of secession: that had time and again been conceded North and South. It was rather the expediency of withdrawing from the Union so long as there was hope of remaining in it with peace and honor. Like Morehead, Graham, Badger, Ruffin, Gilmer and others in this state, and Stephens, Johnson and Hill of Georgia, Mr. Settle believed that secession at that time was premature; that our troubles might and should be settled within the Union rather than out of it. As a union Democrat he therefore became a candidate in Rockingham against the convention and after a spirited campaign was elected over his opponent, Mr. A. M. Scales who, like Toombs and Davis, favored secession. But the people by a narrow majority of 651 (the exact vote being 46,672 to 47,323) decided against the convention, and the

delegates elected were never called upon to assemble. Thus the people of North Carolina refused even to consider the question of withdrawing from the Union although seven of her sister states had already decided to leave it.

But though still in the Union the state was rapidly assuming a military status. Organized companies of militia were called out and new companies formed from volunteers and sent to garrison our forts and protect our coasts from invasion. The secession of Virginia in April left North Carolina hemmed in between the two opposing governments and, after the secession of Arkansas, the only southern state, save Tennessee, remaining in the Union. April 27, 1861, the President of the United States declared the ports of Virginia and North Carolina blockaded and this the Supreme Court subsequently held, in the case of the *Protector,* was legally the beginning of the war in those states. The General Assembly, still in session, by an act concurred in by two-thirds of the members of each House, on the first day of May peremptorily required the governor to call an election to be held on the thirteenth of that month for delegates to a convention of the people of the state to be assembled on the twentieth. Nothing whatever was said in the act as to the purpose or powers of the convention but these were well understood. The election was held, the delegates chosen and the convention met in the city of Raleigh May 20, 1861, and immediately repealed, rescinded and abrogated the ordinance adopted by North Carolina in the convention of 1789, whereby the Constitution of the United States was ratified and adopted, and also all acts of the General Assembly ratifying and adopting amendments to that Constitution, dissolved the Union subsisting between this state and the other states under the title of the United States of America and declared the state of North Carolina in full possession and exercise of all those rights of sovereignty which belong and appertain to a free and independent state. On the same day the convention ratified the constitution of the pro-

visional government of the Confederate States, and thus North Carolina, next to the last of the original states to enter the Union, was the last of them to leave it.

The popularity of Mr. Settle during this period was strikingly illustrated by the fact that, though a Union man and opposed to Mr. Breckinridge's election to the presidency, he was elected early in 1861 solicitor of the fourth judicial circuit by a legislature, the majority of whose members were Breckinridge Democrats. On Monday the twelfth day of April he was prosecuting for the state at Danbury in Stokes County, Judge Howard presiding. He joined James Madison Leach, a Union Whig, in a request for the use of the court room for political speaking during the noon recess. The request was granted and between Mr. Settle, Mr. Leach and the Honorable John A. Gilmer, as Unionists, on the one side, and Mr. A. M. Scales and Mr. Robert McLean, as Secessionists, on the other, there followed a political debate of intense feeling and marked ability. In a few days the court adjourned and the judge and solicitor left for the latter's home in Rockingham—the one as strong for immediate secession as the other was against it. On the way, as they approached Madison, a strong Union town, they discerned a flag floating from a building in the village. They saw at once it was not the flag of the Union. Several persons were riding toward them reading newspapers. Hailing one of them, the solicitor inquired what was the matter. Promptly the answer came: "Haven't you heard the news? Sumter has been attacked. President Lincoln has called for 75,000 troops. Everybody is for war. Governor Reid is speaking at Madison and volunteers are enlisting." The solicitor turned to the judge and exclaimed, "They are right! I must go to Madison and go with them!" They turned out of their way and drove to the village. As they approached they heard the voice of Governor Reid speaking in the upper room of a building while a large crowd was gathered in and around it. The solicitor sprang up and waving

his hand aloft declared that they were right and leaping from the buggy, mounted a doorstep and poured forth a passionate appeal for every man to stand by the South.

"We then went on to his home," says the judge, "and on the way he declared he must resign his office and go into the war. I pressed him not to do so until the end of the circuit but he would listen to no delay, insisting that he must resign and recommending his successor. The next Monday at Rockingham soon after court met, the sound of fife and drum was heard from several directions and soon there marched into Wentworth one hundred and fifty volunteers, and at recess I noticed both Scales and Settle in the ranks. Two companies were formed and Scales was elected captain of one and Settle of the other."

"In a week or two," continues the judge, "I returned to Greensboro. As I was passing the residence of the Honorable John A. Gilmer he called to me and coming out to the buggy said with deep emotion: "On my return home I found that at the very hour I was speaking in Danbury my son was donning his uniform and hastening away to Fort Macon. We are all one now."

Leach too had "heard the news" and had already raised a company of one hundred chosen men from Davidson of whom he had likewise been elected captain. Such was the effect upon the Union men of the South of the attack on Fort Sumter and the call of President Lincoln for troops!

Mr. Settle and Mr. Scales, late antagonists on the stump, were now enlisted as comrades in a common cause and as captains were placed with their respective companies in the Third, afterward the Thirteenth, Regiment of North Carolina troops which earned a proud record in the subsequent struggle. The term of their enlistment was twelve months and on its expiration Mr. Settle returned to his home and was again elected solicitor of his district and held that office until his election to the reconstruction convention of 1865,

winning for himself the reputation of an able lawyer and a fair, impartial officer.

Sixty days after General Lee's surrender there was not a confederate soldier in arms. They had fought to the point of exhaustion and when they gave their parole the war indeed was over. Throughout the Confederacy the surrender was complete. The southern people were anxious to renew their allegiance to the United States and submit to its authority. There was no law on the statute book providing a way for their return to the Union. They could not resume their old relations of their own accord; their state governments had been destroyed or abandoned and they were compelled to look to Washington for the manner, the terms and conditions of their restoration. And there the trouble arose.

Congress in July, 1861, had declared that the war was not prosecuted by the United States in any spirit of oppression nor for the purpose of conquest or subjugation or for overthrowing or interfering with the rights or established institutions of the southern states, "but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof and to preserve the Union with all the dignity, equality and rights of the several states unimpaired;" and that so soon as these purposes were accomplished the war should cease.

Adhering to these resolutions, whenever, during the progress of the war, the Federal forces gained a foothold in a southern state, Mr. Lincoln endeavored to aid and encourage the people of such state to establish a civil government loyal to the United States which he recognized as the true government of the state, and thus, as far as possible, he allowed them to resume their practical relations with the Union. This power he exercised as Commander-in-Chief of the Army and Navy and under that provision of the Constitution imposing the duty upon the United States to guarantee to every state a republican form of government. The

instruments he used to this end were military or provisional governors appointed by him with power to call conventions of those people ascertained by a prescribed oath to be loyal, and these conventions were to provide for the election, by the loyal people of the state, of a legislature and state officers who should put in motion all the machinery of civil government as it existed in the states before the war. They might also elect representatives to Congress, but Mr. Lincoln did not assume to say that they would be admitted, each house being the judge of the election and qualifications of its own members. He was anxious from the beginning, says Mr. Blaine, "to re-establish civil government in any and every one of the Confederate States when actual resistance should cease. A military autocracy controlling people who were engaged in the ordinary avocations of life was altogether contrary to his views of expediency, altogether repugnant to his conceptions of right."

In February 1862, the Confederate forces abandoned Nashville, the capital of Tennessee. The Federal army occupied the city and martial law was declared over the western part of the state. The fifth of March Andrew Jackson was appointed military governor of the state and confirmed by the Senate. He was appointed, as he said, on account of "the absence of the regular and established state authorities" and "for the purpose of restoring her government to the same condition as before the existing rebellion."

The Federal forces obtained a footing in eastern North Carolina in the spring of 1862 sufficient in the view of Mr. Lincoln to warrant the attempt to set up a loyal government in this state. Accordingly Edward Stanley was appointed military governor of the state, and instructions issued to him from the Secretary of War May 2, 1862, similar to those which had been given to Governor Johnson of Tennessee. "The great purpose of your appointment," he was told, "is to re-establish the authority of the Federal government in the state of North Carolina and to provide the means of main-

taining peace and security to the loyal inhabitants of that state until they shall be able to establish civil government." The governor delivered a public address to the people on June seventeenth following but they were not persuaded by his appeals to resume their allegiance and the war came to an end without his effecting any progress towards the restoration of this state.

Likewise, when the national forces captured New Orleans in the spring of 1862 and obtained a firm foothold in Louisiana, a movement was made to establish there a civil government that would be loyal to the Union. In July of that year Mr. Lincoln wrote to a southern gentleman that the people of Louisiana who wished protection to personal property had but to reach forth their hands and take it. "Let them in good faith," said he, "re-inaugurate the national authority and set up a state government conforming thereto under the Constitution. They know how to do it and can have the protection of the army while doing it. The army will be withdrawn so soon as such state government can dispense with its presence; and the people of the state can then, upon the old constitutional terms, govern themselves to their own liking. This is simple and easy."

In accordance with that suggestion a government was soon organized and the third of December, 1862, at an election ordered by the military governor of Louisiana, two members of Congress, old citizens of the state, were chosen who, on the ninth of February, 1863, before the close of the Thirty-seventh Congress, were admitted to their seats. On the twenty-first of November, a few days before that election was held, in a note to the provisional governor warning him that Federal office holders not citizens of Louisiana should not be chosen to represent the state in Congress. Mr. Lincoln referring to the southern states, said: "We do not particularly need members of Congress from those states to enable us to get along with legislation here. What we do want is the conclusive evidence that respectable citizens of Louisiana

are willing to be members of Congress and to swear support to the Constitution, and that other respectable citizens are willing to vote for them and send them. To send a parcel of northern men here as representatives, elected as would be understood (and perhaps really so) at the point of the bayonet, would be disgraceful and outrageous, and were I a member of Congress here, I would vote against admitting any such man to a seat."

The action of Mr. Lincoln in assuming the power to restore Louisiana to the Union so far as her state government was concerned was not approved by the leaders of his party in Congress. They held that the rights of the seceding states under the Constitution had been destroyed by their own action and when they should be conquered it would be for the conqueror to determine *then* what terms it would be expedient to impose. Indeed, the very theory of the Crittendon resolutions passed by Congress in July, 1861, when presented for re-affirmation in December, 1862, was defeated by a party vote. Between the position of the President and that of Congress a serious divergence was developing.

In his message to Congress December 8, 1863, Mr. Lincoln proposed a definite plan of restoration. "The constitutional obligation of the United States," said he, "to guarantee to every State in the Union a republican form of government and to protect the state in such cases is explicit and full. This section of the Constitution contemplates a case wherein the element within a state favorable to republican government in the Union may be too feeble for an opposite and hostile element external to or even within the state, and such are precisely the cases with which we are now dealing. An attempt to guarantee and protect a revived state government constructed in whole or in preponderating part from the very element against whose hostility and violence it is to be protected is simply absurb. There must be a test by which to separate the opposing elements so

as to build only from the sound, and that test is a sufficiently liberal one which accepts as sound whoever will make a sworn recantation of his former unsoundness."

He accompanied the message with a proclamation in which he granted full pardon with restoration of all rights of property, except as to slaves, to all persons who had directly or by implication participated in the Confederacy, upon condition that every such person should take and subscribe and thenceforward maintain inviolate an oath to faithfully support and defend the Constitution and the Union of the states thereunder and to abide by all laws and proclamations made during the existence of the Confederacy, having reference to slaves, "so long and so far as not modified or declared void by decisions of the Supreme Court."

Excepted from the benefits of this pardon were, first, the civil and diplomatic officers or agents of the Confederate government; second, those who left judicial stations in the United States government to aid the Confederacy; third, military officers of the Confederacy above the rank of colonel and naval officers above the rank of lieutenant; fourth, all who left seats in the Congress of the United States to aid the Confederacy; fifth, all who resigned commissions in the national army and navy and afterwards aided the Confederacy; sixth, all who had engaged in treating colored persons, or white persons in charge of them, found in the military or naval service of the United States, otherwise than as prisoners of war.

The task of establishing a state government was thus entrusted by Mr. Lincoln's plan to the loyal people of the state, tested by taking the prescribed oath. He required that enough should take it in any state to cast one-tenth as many votes as were cast in that state for President in 1860. The qualifications of voters should be the same as those existing by the law of the state immediately before the act of secession. A government thus established in any seceding state should "be recognized as the true government of the state"

and the state should "receive thereunder the benefits of the constitutional provision which declares that the United States shall guarantee to every state in this Union a republican form of government." Clearly, then, such states were not altogether, in his opinion, outside of the Constitution or the Union.

Any provision which might be adopted by such state government recognizing the permanent freedom of the colored people and providing for their education consistently with their condition as a laboring, landless and homeless class would not, said he, "be objected to by the National Executive." The question of the admission of senators and representatives was to be decided by the respective Houses of Congress. The President took pains to say that his proclamation was intended to present to the people of the states wherein the national authority had been suspended and loyal state governments subverted, "a mode by which the national authority and loyal state governments might be re-established within such states;" and while the mode presented was the best the Executive could suggest with his present impressions, it should not be understood that no other possible mode would be acceptable.

In pursuance of the President's proclamation state governments were established during the following year in Louisiana, Arkansas and Tennessee and constitutions were adopted abolishing slavery.

This plan of Mr. Lincoln's was not favorably received by the leaders of his party in Congress. They thought so important a matter should have been determined by legislation and not by mere executive proclamation. A sharp issue was drawn between the President and Congress. The senators and representatives chosen by the reorganized state governments, which he had declared he would recognize, were refused admission to seats. This conflict rendered the situation doubly confusing. According to the Democratic and southern theory those states were in the Union; accord-

ing to the congressional theory they were out of the Union. Under the operation of the President's plan they were partly in and partly out of the Union. So far as executive recognition had validity they were in; but so far as the important function of representation in Congress was concerned, they were out.

The leaders of Congress proceeded to answer the President's position with a bill passed July 4, 1864, the first reconstruction act of Congress. It set forth the congressional plan of reconstruction and was known as the Wade-Davis bill. It provided that the President should appoint a provisional governor in each of the seceding states and that so soon as resistance to the national authority had ceased in any state, the governor should enroll the white male citizens; and if a majority of them should take an oath to support the Constitution of the United States, then the election of delegates to a constitutional convention should be ordered. The state constitution should contain provisions imposing disabilities upon certain civil and military officers of the Confederacy, prohibiting the payment of all debts incurred in aid of the Confederacy, and abolishing slavery. When all requirements had been complied with *to the satisfaction of Congress,* the President should recognize the state government and the state should thereupon become entitled to representation in Congress. The measure contained no provision for negro suffrage.

The bill did not reach the President until a few hours before the *sine die* adjournment of Congress. He did not sign it and it failed to become a law. He gave his reasons in a public proclamation in which he said that he did not wish by signing the bill "to be inflexibly committed to any single plan of restoration" or to declare that the state governments already established should be "set aside and held for naught, thereby repelling and discouraging the loyal citizens who have set up the same as to further effort, or to declare a constitutional competency in Congress to abolish

slavery in the states." At the same time he was "satisfied with the system contained in the bill, as one very proper for the loyal people of *any state choosing to adopt it*," and to that end he would give executive aid and assistance to any such people as soon as military resistance to the United States was suppressed in such state and the people thereof returned to their obedience to the Constitution and laws of the United States, in which case military governors would be appointed with directions to proceed according to the bill."

The President was answered by the authors of the bill in a paper personally vituperative, in which his motives were impeached and his action characterized as "a studied outrage on the legislative rights of the people." The issue was squarely made whether the President by military order was to restore, or Congress by law to reconstruct, the insurrectionary states. Mr. Lincoln had been re-nominated for President in June and in August a conference of leading men of his party was held in New York and a committee appointed to request him to withdraw and to bring about a new convention to nominate a Union candidate. Mr. Sumner writing to Cobden says: "The 'Tribune,' 'Evening Post,' 'Independent,' and 'Cincinnati Gazette' were all represented in it, but as soon as they read the platform (adopted by the Democrats at Chicago) they ranged in support of Mr. Lincoln."

On all the great questions which finally stood forth in the process of reconstruction, namely, the legal status of the seceded states, by whose authority they should be allowed to resume their place in the Union, the status and punishment of the individuals who joined the Confederacy, and the legal and political status to be given to the negro, the President held one view and Congress another. Four days before his death, in the last public address he made, he declared that his plan of restoration had been submitted in advance to his cabinet and "distinctly approved by every member of it"

and that while no exclusive and inflexible plan could safely be presented as to details, the important principles involved were and must be inflexible. His closing words were: "In the present situation it may be my duty to make some new announcement to the people of the South. I am considering and shall not fail to act when satisfied that action will be proper."

That "new announcement," according to General Grant and Mr. McCulloch, a member of both Cabinets, was the proclamation of amnesty and pardon which had already been prepared by Mr. Lincoln and which was subsequently, on May 29, 1865, issued by his successor, Mr. Johnson. This proclamation was similar to that of December 8, 1863, except that fourteen classes of persons instead of six were excepted from the privileges of the amnesty. The theory was the same.

On the same day, May 29, 1865, President Johnson appointed William W. Holden Provisional Governor of North Carolina and required him "at the earliest practicable period to prescribe such rules and regulations as might be necessary and proper for convening a convention composed of delegates to be chosen by that portion of the people of the state who were loyal to the United States, for the purpose of *altering* or *amending* its constitution; and with authority to exercise, within the limits of the state, all the powers necessary and proper to enable the loyal people of the state to restore it to its constitutional relations to the Federal government."

In the election of delegates to the convention no person was to be a qualified elector or eligible as a member unless he had previously taken the oath of amnesty set forth in the President's proclamation and was a qualified voter under the constitution and laws of the state in force immediately before the 20th day of May, 1861. The President further directed that the convention or the legislature that might thereafter assemble should prescribe the qualifications of electors and

the eligibility of persons to hold office under the constitution and laws of the state, "a power," said he, "the people of the several states composing the Federal Union have rightfully exercised from the origin of the government to the present time."

The heads of the several departments of the national government were directed to put in force in North Carolina all laws of the United States, the administration of which belonged to their respective departments; and in making appointments they were directed to give preference to qualified loyal persons residing within the state. The United States Judge for the district in which North Carolina was included was directed to hold courts within the state in accordance with the provisions of the act of Congress, and the Attorney-General was instructed to enforce the administration of justice in the state in all matters within the cognizance and jurisdiction of the Federal courts. Mr. Seward accompanied the order with a circular directing that the prescribed oath might be taken and subscribed before any commissioned officer, civil, military or naval, in the service of the United States, or any civil or military officer of the state who by the laws thereof, might be qualified for administering oaths.

In performance of the duty imposed by the order of his appointment Governor Holden, on August 8, 1865, ordered an election to be held on the twenty-first day of September for delegates to a convention to assemble in Raleigh on the second day of October following, for the purpose specified in the order of the President appointing him. The number of delegates to be chosen was one hundred and twenty. Mr. Settle was elected from Rockingham.

The first southern reconstruction assemblies were severely criticised and condemned by the North. Thaddeus Stevens spoke of them at the time as an "aggregation of whitewashed rebels who, without any legal authority, have assembled in the capitols of the late rebel states and simulated legislative

bodies." And Mr. Blaine, in his *Twenty Years of Congress,* refers to them as "an assemblage of oligarchs * * * little else than consulting bodies of Confederate officers under the rank of brigadier-general, actually sitting throughout their deliberations in the uniforms of the rebel service and apparently dictating to the government of the Union the grounds on which they would consent to resume representation in the National Congress;" and their official acts, he asserts, were "inspired by a spirit of apparently irreconcilable hatred of the Union," and were intended practically to re-enslave the negro. Passing by the question of the justice of these criticisms, as they relate to the conventions and legislatures of other southern states, let us see whether or not they are justly applicable to those of North Carolina.

The first reconstruction convention of North Carolina was composed of men who were nearly all old-line Whigs and Union Democrats originally opposed to secession. Of its members nine, namely, Giles Mebane of Alamance, E. J. Warren of Beaufort, D. D. Ferebee of Camden, Bedford Brown of Caswell, George Howard of Edgecombe, R. P. Dick of Guilford, W. A. Smith of Johnston, John Berry of Orange, and A. H. Joyce of Stokes, had been members of the secession convention of 1861. Bedford Brown had been a United States Senator, and two other members, John Pool and Thomas J. Jarvis, afterwards became United States Senators from this state; six, Nathaniel Boyden, Gen. Alfred Dockery, Alexander H. Jones, I. G. Lash, Edwin G. Reade and W. A. Smith, had been or were afterwards members of Congress from this state; three, C. C. Clarke, Jesse R. Stubbs and Samuel H. Walkup, were elected members of the Thirty-ninth Congress but were not allowed to take their seats; two, Tod R. Caldwell and Thomas J. Jarvis, were afterwards Governor of the state; one, M. E. Manly, had been a Justice of this Court, and seven others, Boyden, Bynum, Dick, Faircloth, Furches, Reade and Settle, became Justices of this Court, two of whom, Faircloth and Furches,

were Chief Justices; three, Brooks, Dick and Settle, became United States District Judges; six, Buxton, Furches, Gilliam, Howard, Warren and McCoy, had been or afterwards became Judges of the Superior Courts of North Carolina. In addition to these the convention numbered among its members such eminent lawyers as B. F. Moore of Wake, Samuel F. Phillips of Orange, William A. Wright of New Hanover, Patrick H. Winston of Franklin, D. H. Starbuck of Forsyth, William Eaton, Jr., of Warren, Neill McKay of Cumberland, R. S. Donnell of Beaufort, Edward Conigland of Halifax, Neal A. McLean of Robeson, R. H. Winburne of Chowan, W. A. Allen of Duplin, and A. H. Joyce of Stokes; and such prominent professional and business men as E. M. Stevenson of Alexander, Lewis Thompson of Bertie, D. F. Caldwell of Guilford, J. R. Love of Jackson, Dr. Eugene Grissom of Granville, Dr. William Sloan of Gaston, Montford McGehee of Person, Daniel L. Russell, Sr., of Brunswick, Giles Mebane of Alamance, L. L. Polk of Anson, R. L. Patterson of Caldwell, Thomas I. Faison of Sampson, J. S. Spencer of Montgomery, James McCorkle of Stanly, and others who were eminent and useful citizens of the state.

The convention met in the hall of the House of Commons in Raleigh at noon October 2, 1865, and its first act was to have administered to its members the oath to support the Constitution of the United States and to direct the flag of the nation to be raised over the capitol during the deliberations of the convention. Edwin G. Reade was unanimously elected president. One paragraph in his address on assuming the chair showed the spirit and sentiment of the convention. "Fellow-citizens," said he, "*we are going home.* Let painful reflections upon our late separation and pleasant memories of our early union quicken our footsteps toward the old mansion, that we may grasp hard again the hand of friendship which stands at the door, and sheltered by the old homestead which was built upon a rock and has weathered

the storm, enjoy together the long, bright future which awaits us."

The provisional governor quoted this paragraph approvingly in his message, which likewise was conciliatory in tone and temper. Mr. Settle was among the younger members but was active in the discussion of all matters of public interest that came before the convention. He was chairman of the commitee on the Abolition of Slavery and the author of the ordinance forever abolishing slavery in this state. He was also chairman of the special committee on the State Debt and a member of other important committees of the convention. He was described at that time by a northern spectator as "a man about six feet in height, 190 pounds in weight and 34 years of age; erect, broad-shouldered, with full face, firm mouth, bronzed and rosy cheeks, large brown eyes, dark-brown hair and whiskers. He speaks with force and unmistakable emphasis, gesticulates with a full sweep from the shoulder, and adds a sincere love of the Union to a hearty hatred of secession." Mr. Moore, chairman of the committee on the Revision of the Constitution; Mr. Boyden, chairman of the committee on the Ordinance of Secession; Mr. Phillips, chairman of the committee on the Acts of the Convention, the Legislature and the Courts since 1861, and Mr. Settle, were the leaders of the majority in the convention.

By a vote of one hundred and five to nine an ordinance was passed on the fourth day of the convention declaring the ordinance of secession null and void from the beginning. Those voting in the negative objected merely to the form of the ordinance. They were willing to vote for a resolution declaring that the arbitrament of the sword had decided against the right of a state to secede, but to declare the ordinance of secession null and void from the beginning was in their opinion a grave reflection upon the able body that passed that ordinance; and they distinctly stated that in opposing the proposed ordinance they were not to be considered seces-

sionists. On the fifth day, by a vote of one hundred and nine in the affirmative and none in the negative, an ordinance was passed forever prohibiting slavery in the state. At the urgent request of President Johnson an ordinance was also passed forbidding the payment of the debts created or incurred by the state in aid of the war. As to the negroes, the governor by authority of the convention appointed B. F. Moore, W. S. Mason and R. S. Donnell commissioners to prepare and report to the legislature next elected a system of laws upon the subject of freedmen and to designate such laws then in force as should be repealed in order to conform the statutes of the state to the ordinance of the convention abolishing slavery. All the machinery of civil government was provided and established; the state was divided into congressional districts and an election for governor and other executive officers and for members of the General Assembly and of Congress was ordered to be held on the second Thursday of November following, and on October 19th the convention adjourned until May 24, 1866. Judge Reade, its president, temporarily dismissing the delegates, declared: "Our work is finished. The breach in our government so far as the same was by force, has been overcome by force; and so far as the same had the sanction of the legislature, the legislation has been declared null and void. So that there remains nothing to be done except the withdrawal of military force, when all our governmental relations will be restored without further asking on the part of the state or giving on the part of the United States * * * It remains for us to return to our constituents and engage with them in the great work of restoring our beloved state to order and prosperity."

Admirable optimism, but how mistaken! More than a month before Charles Sumner, leader of the Senate, addressing the Republicans of Massachusetts, had declared: "It is *impartial suffrage* that I claim, without distinction of color, so that there shall be one equal rule for all men. And this

too, must be placed under the safeguard of constitutional law * * * As those who fought against us should be for the present disfranchised, so those who fought for us should be enfranchised. All these guaranties should be completed and crowned by an amendment of the Constitution of the United States especially providing that hereafter there shall be no denial of the electoral franchise or any exclusion of any kind on account of race or color, but all persons shall be equal before the law." At the same time Thaddeus Stevens, the master spirit of Congress and of the period, writing to Sumner about the Republican State Convention of Pennsylvania recently held, complained that negro suffrage had been passed over by it as "heavy and premature." But, said he, "get the Rebel States into a *territorial condition* and it can be easily dealt with. That, I think, should be our great aim. Then Congress can manage it." Here were foreshadowed the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and it was predetermined that the work of our convention, whatever it might be, if it fell short of establishing and securing impartial or universal suffrage, should come to naught. The plan of Lincoln and of Johnson was already doomed to defeat by the great leaders of their party in Congress.

The election was held November 9, 1865. The anti-secession and anti-slavery ordinances adopted by the convention were ratified by the people, the former by a vote of 20,870 for, and 1,983 against it, and the latter by a vote of 19,039 for, and 3,970 against it. Seven members of Congress were elected, among them Charles C. Clarke from the second district, Thomas C. Fuller from the third, and Col. Josiah Turner from the fourth, the Raleigh district. A General Assembly and state officers were also elected.

Interest centered largely in the contest for governor. It was the ambition of Mr. Holden to be elected governor by the people. He had been a member of the convention of 1861 and voted for the ordinance of secession. He was a

Democrat who strongly favored the war when it began, but by 1864 had become an avowed Union man who favored the immediate termination of the war and the speedy restoration of the state to the Union. That year he had been a candidate against Mr. Vance for governor but was defeated. He was a personal acquaintance and friend of President Johnson and had been appointed by him provisional governor for this reason and also because of his acknowledged ability and pronounced unionism. He was intensely hated by the Democrats. Considerable indignation had arisen in the convention from the belief that President Johnson's telegram to him urging the convention to repudiate the state war debt was sent at his instigation. Notwithstanding the urgent request of the President, Mr. Moore had proposed to leave the whole matter to the people and this proposition was defeated by only four majority, the vote being 46 to 50.

Jonathan Worth was then State Treasurer in the provisional government. His record for unionism was good. He was a Whig and had opposed secession. He believed, as he afterwards said in his message, that the war ought never to have occurred—that it never would have occurred if the masses of the people of the two sections could have met in council and freely interchanged opinions and information. He was satisfied that the jealousy, hatred and distrust engendered by the struggle prevailed among politicians with far more intensity than among the citizens, including the late soldiers in either section. But he was squarely in favor of paying the debts created by the state in aid of the Confederacy, while Holden was one of the leading spirits who opposed it.

A powerful opponent of Mr. Holden was Col. Josiah Turner, then editor of the Raleigh *Sentinel*. Mr. Turner came within one of the classes excepted by the President in his proclamation of amnesty and it was necessary for him to have his disabilities removed by pardon or otherwise before he could vote or be eligible to office. Pardons were secured

by petition to the President approved by the governor. Mr. Turner prepared his own petition and being an ardent Whig and a Union man, it was nothing less than a severe arraignment of the provisional governor and the party to which he belonged at the commencement of the war. It was forwarded to the President with a recommendation by the provisional governor that it be held up. Mr. Turner went to Washington to inquire about the delay and was shown the endorsement of the provisional governor on the petition. He returned to Raleigh and the night afterwards, by appointment, delivered a characteristic speech in the court house, bitterly denouncing Holden and urging the nomination and election of Mr. Worth. Within twenty-five days of the election Worth was prevailed upon and his candidacy for governor announced. Mr. Turner supported him powerfully in his newspaper and on the stump and as effectually opposed Mr. Holden. Mr. Worth was supported largely by those who had been secessionists and Mr. Holden by the unionists. Mr. Settle, always a consistent Union man and the champion of the ordinance forbidding the payment of the state war debt, in which he was aided by the President and Governor Holden, naturally supported the latter in his candidacy as he had also done in 1864. Holden was defeated by a majority of 5,939, his vote being 25,704 and Worth's 31,643, showing a loyal qualified electorate of 57,347 in the state, while the total vote cast for President in 1860 was 96,230, thus meeting many times over the requirement of Mr. Lincoln that the loyal electorate should be as many as one-tenth of the actual voting population in 1860.

To complete the work of restoration required by the President the General Assembly met November 30, 1865. Many of its members were also members of the convention which had recently adjourned. Mr. Settle had been elected from Rockingham and was chosen Speaker of the Senate, thus, before his thirty-fifth year, attaining the speakership of both branches of the legislature. The convention had already

repealed the ordinance of secession, abolished slavery and prohibited the payment of the debts created by the state in aid of the Confederacy; and the legislature was now requested to take the only remaining step necessary for complete restoration by ratifying the Thirteenth Article of Amendment to the Constitution of the United States which had been submitted by Congress in February before. Though out of the Union, according to the view of Congress, the state was thus called upon to exercise and did exercise one of the highest functions of an American state in the Union. On November 21 Governor Holden had received the following telegram from Mr. Seward, Secretary of State:

"The President sincerely trusts that North Carolina will, by her legislature, promptly accept the Congressional Amendment of the Constitution of the United States abolishing slavery.

"He relies upon you to exercise all your functions as heretofore, with the same wisdom and in the same spirit of loyalty and devotion to the Union that has marked your administration hitherto.

"The President desires you to feel entirely assured that your efforts to sustain the administration of the government and give effect to its policy are fully appreciated and that they will, in no case, be forgotten."

The proposed amendment was almost unanimously ratified December the fourth. On the same day Congress met and the loyalty of the southern people and their right to representation in that body were denied. The representatives from the southern states were denied their seats. William A. Graham and John Pool, both Whigs and original Union men, were elected senators from this state. A joint committee of fifteen, six senators and nine representatives, was appointed by Congress to inquire into the condition of the southern states and report whether they or any of them were entitled to be represented in either House of Congress. General Grant, who had recently been in the South, reported in

effect that they were, and General Shurz, fresh from the same country, reported substantially that they were not. These reports accompanied a special message from the President to the Senate in response to a call for information on the progress of reconstruction in the South and furnished arguments respectively to the friends and opponents of the President in his efforts to restore civil government in the southern states. The twenty-seventh of November the President had sent Governor Holden the following telegram, which was published in the *Standard:*

"Accept my thanks for the noble and efficient manner in which you have discharged your duty as provisional governor. You will be sustained by the government.

"The results of the recent elections in North Carolina have greatly damaged the prospects of the state in the restoration of its governmental relations. Should the action and the spirit of the legislature be in the same direction, it will greatly increase the mischief already done and might be fatal.

"It is hoped the action and spirit manifested by the legislature will be so directed, as rather to repair than increase the difficulties under which the State has already placed itself."

To correct the impressions indicated by that message the General Assembly on the ninth unanimously passed the following resolutions and transmitted a copy of them to the President and Congress:

"Resolved, That the people of North Carolina have accepted the terms offered them by the President of the United States, and have complied with the conditions laid down by him as necessary to restore our constitutional relations with the other states of the Union; and that they have done so in good faith, and with the intention and determination to preserve and maintain them.

"Resolved, That the people of North Carolina are loyal to the government of the United States, and are ready to make

any concessions not inconsistent with their honor and safety, for the restoration of that harmony upon which their prosperity and security depend.

"*Resolved,* That we have confidence in the ability, integrity and patriotism of Andrew Johnson, President of the United States; and that in behalf of the people of North Carolina, we return our thanks to him for the kindness, liberality and magnanimity which he has displayed towards them."

About the middle of December the legislature adjourned until February, but was called to meet in extra session by Governor Worth January 18, 1866. Before adjournment, however, it presented to the President of the United States the following Memorial, in the preparation and sentiments of which Mr. Settle heartily shared, and asked that the same be laid before Congress:

"The Memorial of the General Assembly of the State of North Carolina respectfully shows that this assembly was appointed, elected and convened in strict accordance with your Excellency's plan for reorganizing the states lately at war with the United States. The people of North Carolina embraced with zeal and with a loyal spirit your Excellency's plan for the restoration of the state to the rights of a member of the Federal Union, and since the surrender of General Johnson, they have been universally actuated by a fixed and honest desire to be faithful citizens of the United States.

"According to your Excellency's instructions, a convention of the people was held in October, which repealed the ordinance of secession, declaring it never to have been in force; abolished forever the institution of slavery, and forbade the legislature ever to assume or provide for debts contracted for the war. The convention also provided for an election for governor, for members of this assembly, and for various local officers, and immediately after the meeting of this assembly, the amendment to the Constitution of the United States, abolishing and prohibiting slavery, was ratified with almost perfect unanimity.

"The late elections were held without excitement or tumult, and in good faith towards the government and Constitution of the United States, and whatever differences of opinion there may have been as to men, the people were a unit in their desire to do all that your Excellency required them to do, and to live in peace under and in obedience to the Constitution and laws of the general government of the United States.

"Your memorialists therefore respectfully desire that the civil law may be restored and the state permitted to resume its position as a member of the Federal Union. They make no complaint of the military authority here, but on the contrary, would bear cheerful testimony to the wise regard of your Excellency for the interest of the people, and to the efficiency and courtesy of the officers who are, and have been, in command in North Carolina. But it is respectfully and earnestly submitted, that the wisest and best system of military rule alone will necessarily fail in accomplishing what the circumstances of this people require.

"They have for generations been accustomed to the exercise of civil law, to the machinery of a state with a governor, legislature, courts of various grades, and county organizations. Hundreds of important and vital interests are waiting the care of local legislation and of local officers, and the sad desolations of war, material and moral, demand that life and energy should be immediately imparted to every agency of society. The interests of the people of North Carolina are the interests of the people of the United States; it is important to the whole country that the great resources of the region should be developed; that the soil should be cultivated with hopeful energy and thrift; that trade should be revived; that schools should be established; that crime should be punished and a healthful moral tone promoted. No human being in North Carolina anticipates the possibility or the desire of renewed rebellion here, and all the inhabitants of

the state desire to perform their obligations to the country and to have the national credit sustained.

"But the present state of suspense and insecurity of long continuance will necessarily result in the most deplorable injuries. It is natural that the late tremendous contest should make sad breaches in society and open a way for a fearful harvest of ruin and crime. The people so severely crippled in their pecuniary resources and in the loss of nearly all their implements of industry are in danger of becoming hopeless and heartless. Honest and useful enterprise is at a stand, works of internal improvement are likely to be arrested and go to decay, moral agencies of every kind are languishing, the tendency to immigration is checked, and the all-pervading power of the civil law, executed by numerous and efficient agents, being no longer felt, there is no security in the dealings between man and man; the passions of the evil-disposed are not held in check, and oppression, fraud, violence and wrong, in all their countless forms, are left to prey on every community. If the threatened process of demoralization is not speedily checked by the life-infusing power of efficient civil authority and by the restoration of moral power, North Carolina, instead of being a useful and profitable member of the Federal Union, will be scourged by the outlaw and bandit and will fall into a condition in which she will be only a burden to the general government. In view of these considerations so important to the entire nation, your memorialists respectfully ask that the machinery of the civil government of the state may be restored to vitality and set in motion, with full authority to protect our rights and punish all crime, and be thereby enabled to preserve our ancient fame as a moral, pure and law-abiding people. And they would ask this much, even if, for reasons that seem good to your Excellency, North Carolina is not permitted to resume her position in the Federal Union.

"When North Carolina gives her pledge she does it hon-

estly. She has again tendered her plighted faith to the Government of the United States and she has manifested her spirit by acts that speak for themselves. There is no disloyalty among her people, no thought or dream of another rebellion. They are not ashamed of their courage, however, nor of their honest tenacity of purpose and desire to be free, and they feel assured that the brave and generous people of the North will respect in them that manhood which, upon an hundred fields, has won the applause of a gazing world.

"They have cheerfully given up their slaves and they are now actuated by a sincere desire of promoting the welfare and happiness of the unfortunate negro between whom and them there are very many old and tender ties.

"Your memorialists present themselves to your Excellency and to the representatives of this Great Nation with as honorable a purpose as ever actuated any people."

Pursuant to this request the President directed Governor Holden to discontinue the provisional government, and on the twenty-eighth of December, 1865, by direction of the President, he turned over to Governor Worth the Great Seal of the state and its other property and effects in the capitol, and Governor Worth entered upon the discharge of his duties as civil governor. The General Assembly met in extra session January 18, 1866, to perfect the organization of civil government in which there had been discovered some defects. On January 22 the learned commissioners appointed by the convention to conform the statutes of the state to the changed conditions resulting from the emancipation of the slaves submitted an able and thorough report recommending an enlargement of the rights and privileges of the freedmen and abolishing discriminations against them. The report was substantially enacted into law. It conferred upon persons of color the same rights and subjected them to the same disabilities as by the laws of the state were conferred on or attached to free persons of color prior to emancipation. The courts were fully opened to them for the protection of their

persons and property, by permitting them to sue and be sued in any court of the state and to be heard as witnesses whenever their rights were in controversy. In civil cases their evidence was allowed only where their rights of person or property were put in issue and would be concluded by the judgment or decree to be rendered, and in criminal cases only where the violence, fraud or injury alleged was charged to have been done by or to persons of color. In all other civil and criminal cases such evidence remained inadmissible unless by consent of the parties of record. When a colored person was a party he might call to the witness stand any other persons, white or colored, not otherwise incompetent; while in cases where white persons alone were parties, white persons only were competent as witnesses.

This enlargement of the rights of colored persons, however, was not to be effectual until jurisdiction of matters relating to them should be fully committed to the courts of this state; that is, until the Freedmen's Bureau relinquished its exclusive jurisdiction in matters relating to them. This provision was subsequently repealed by the convention. The laws of marriage, and in general, all laws affecting white persons were, with few exceptions, made applicable to colored persons. They were protected in the making and enforcement of contracts and with the exception of suffrage were placed upon an equality before the law with white people.

Neither the convention nor the legislature touched the question of suffrage. They were not required by the President to do so. It was left as it was before the war. It was no part of the plan of Mr. Lincoln or of Mr. Johnson to compel the southern states to adopt any particular form of suffrage or to trail under any particular political banner as a pre-requisite to the resumption of their practical relations with the Union. In their opinion the question was one solely for the states themselves, the Federal government having no power in the premises. Mr. Lincoln's idea is thus expressed in a letter to Governor Hahn of

Louisiana, March 13, 1864: "Now you are about to have a convention which among other things will probably define the elective franchise. I *barely suggest for your private consideration,* whether some of the colored people may not be let in—as for instance, the very intelligent and especially those who have fought gallantly in our ranks. They will probably help in some trying time to come to keep the jewel of liberty within the family of freedom. *But this is only a suggestion, not to the public, but to you alone.*"

President Johnson in August, 1865, had written the provisional governor of Mississippi *suggesting* that the convention of that state then in session extend the elective franchise to all persons of color who could read the Constitution of the United States in English and write their names and who owned real estate valued at not less than $250 and paid taxes thereon. "This," said he, "you can do with perfect safety and thus place the southern states with reference to free persons of color on the same basis with free states."

The legislature adjourned in March. The convention met again on the twenty-fourth of May and amended the constitution of 1835 so as to embrace in it, among other things, the prohibition of slavery and the establishment of a strictly white basis for representation in the House of Commons, and submitted it thus amended to the people for ratification and adoption. The convention adjourned the twenty-fifth of June. It had performed its duties in a spirit of loyalty to the Union and it was for the people to confirm or reject what it had done.

In the meantime, on June 16, 1866, the Fourteenth Amendment had been submitted to the state for ratification, the second time during this period, when the state was treated by Congress as out of the Union, that it had been called upon to exercise the high function of accepting or rejecting an amendment to the Constitution of the Union. The proposed amendment would disfranchise many of the leading citizens of the state. A legislature was to be elected

in August before whom the question of its ratification would be presented. This amendment and the new state constitution were the great issues in the campaign in North Carolina that year. The Freedmen's Bureau, with its separate courts for controversies affecting the colored people, had created great friction and irritation among the people. The great debate on reconstruction, begun in Congress in December before, was still going on. In it the southern states were declared by the leaders of the dominant party to be out of the Union, without loyal civil governments, and with no power in the Executive to restore or re-admit them except upon terms satisfactory to Congress. Yet all the machinery of civil government was in full operation throughout this state and order and quiet prevailed. Judges of the Supreme and Superior Courts and all local officers had been elected and were performing their duties. Governor Worth in his message to the General Assembly of 1866-67 declared that not a single instance had occurred where a sheriff had occasion since the surrender to require a posse or other aid to civil process. "Our judges," said he, "have executed their duties in a manner which would have given lustre to the judiciary of any period in the history of the world. The steadiness with which they have held the scales of justice has at last extorted praise even from those who at first studied to malign them." Lamenting the action of a few agents of the Freedmen's Bureau and some of our own people in seeking to make the impression at the North that freedmen and Union men could not get justice at the hands of our courts, he declared that these machinations were well understood at home and that no murmur was then heard against the fairness with which justice was administered in our courts; that increase of crime was being rapidly repressed and reverence for justice was having its triumph.

Referring to the rejection of our senators and representatives in Congress, he declared that every citizen who had advocated the doctrine of secession before the war or taken

conspicuous part in the military conflict, had delicately foreborne to ask for a seat in Congress; that no one who had favored the initiation of the war or distinguished himself in the field during its progress had asked to be made a member of Congress; that "every senator and representative elected had always opposed secession until the United States could no longer protect his personal property." "The people of this state with a singular approach to unanimtiy," said he, "are sincerely desirous of a restoration of their constitutional relations with the American Union. In the face of circumstances rendering it nearly impossible, they have paid its government the taxes of former years, laid when another *de facto* government, whose powers they could not have resisted if they would, was making levies in money and in kind almost greater than they could bear; they have acquiesced in the extinction of slavery which annihilated more than half their wealth, they have borne with patience the exclusion of their senators and representatives from the House of Congress, where they have had no one to contradict or explain the most exaggerated misrepresentations or even to make known their grievances. How long this unnatural condition of our relations is to continue, it seems we shall be allowed to have no share of determining." He unhesitatingly recommended the rejection of the Fourteenth Amendment.

In his opposition to this amendment and also to the new constitution submitted by the convention Governor Worth followed the leadership of the two most eminent citizens of the state, Chief Justice Ruffin and Governor Graham. Early in July, 1866, the Chief Justice published an elaborate argument against the whole programme of restoration adopted by President Johnson and particularly against the convention and the constitution framed by it. "I consider," said he, "that this is no constitution because your convention was not a legitimate convention and had no power to make a constitution for us or to alter that which we had and have; and

that it cannot be made a constitution even by popular sanction." The convention, he maintained, was called without the consent of the people of the state, by the President of the United States or under his orders; "an act of clear and despotic usurpation, which could not give that body any authority to bind the state or its inhabitants." The delegates were not the choice of the people, he said, because of the unlawful restrictions placed on the qualifications of those persons who were eligible and those who might vote for them. They were not authorized by the President to frame a constitution and were not chosen for that purpose. The modes of amendment prescribed by the old constitution had not been followed by the convention and its acts in this respect were void. "It had no powers and could not make a constitution," he declared; "for the same reason the people have no powers and that, as neither the convention nor the people have any power in the premises, by consequence both together are equally destitute of the requisite power. The convention was an unauthorized body and therefore no more than a voluntary collection of so many men—a caucus recommending to the people to adopt by their vote a certain instrument as our constitution, a thing which the people, under our constitution, are not competent to do on that recommendation, and therefore the conjoint resolutions and votes of the two bodies have no more effect than that of either by itself." For these and other reasons, the great Chief Justice concluded that the proposed instrument was no constitution and could not be made one by what had been done or by what could be done, and he therefore earnestly urged the people to reject it. His opinion was accepted and acted upon by a majority of the people. The constitution was rejected by a vote of 19,570 to 21,552, and at the same time a legislature was elected who rejected the Fourteenth Amendment on the fourteenth of December, 1866.

Mr. Settle earnestly advocated the adoption of the constitution and the acceptance of the Fourteenth Amendment as

the assured and promised way to end our anomolous situation and gain admission to the union of the states. The failure of these measures was a deep disappointment to him. In the defeat of the former the work of the convention, as well as the friendly attitude and intercession of President Johnson, were in a measure disapproved and in the rejection of the latter the state had gone counter to the expressed will of Congress which now was supreme; and on March 2, 1867, nearly two years after the surrender, the second Reconstruction Act was passed over the President's veto, by which the governments of the southern states were destroyed and they were remitted to military rule until they should adopt the Fourteenth Amendment and incorporate in their organic law the principle of free and impartial suffrage. Stevens and Sumner had at last triumphed. Johnson and the South, too sure of success and too chary, perhaps, of compromise and concession, were defeated, *but only for a generation.*

I will not stop to inquire which were right, legally or practically. "The war," says Mr. Hart, in his *Life of Chief Justice Chase,* "begun in 1861 on the theory that it was impossible for a state to withdraw from the Union, ended in the plain fact that the seceded states were practically out of the Union. * * * The southern people supposed that an oath of allegiance to the United States would re-admit them into its fellowship; Johnson took the ground that all the important participants in the rebellion should be punished by the loss of the suffrage until he should restore the privilege by individual pardons; Congress intended that it was to decide what persons might take part in reviving the state governments, and was determined that the states as communities should be punished by the imposition of humiliating conditions of restoration. The only logical and consistent theory was that of the southerners, and that was impracticable because it did not secure to the country the objects for which the war had been fought."

"After this long lapse of time," says John Sherman in his

Recollections, "I am convinced that Mr. Johnson's scheme of reorganization was wise and judicious. It was unfortunate that it had not the sanction of Congress and that events soon brought the President and Congress into hostility. Who doubts that if there had been a law upon the statute book by which he people of the southern states could have been guided in their effort to come back into the Union, they would have cheerfully followed it, although the conditions had been hard? In the absence of law both Lincoln and Johnson did substantially right when they adopted a plan of their own and endeavored to carry it into execution."

A definite and certain way of return having at last been prepared, the practical question was the acceptance or rejection of it. To accept it meant immediate re-admission with all the rights of an American State; to reject it, continued military rule. Mr. Settle, like many of his friends, acquiesced in the stern measures prescribed by Congress. He was deeply convinced that the interests of the state required the prompt acceptance of these terms, with a resolute purpose on the part of the people of making the best they could of the dark and troublesome situation. Accordingly on the twenty-seventh of March, 1867, he attended a convention at Raleigh whose object was the organization of a party with that end in view. Upon his motion it assumed the name of the Republican party and allied itself with that political organization. Its cardinal principles were Liberty, Union and Equality before the law and it advocated the acceptance of the plan of reconstruction proposed by Congress. Shortly afterwards, by request of his neighbors and friends, he set forth his views on public affairs in a speech at Spring Garden, Rockingham County. He had participated in the war and had held a judicial office under a confederate state government and was himself disfranchised under the recent act. His audience was composed of both white and colored people. He had no arguments for one that could not properly be addressed to the other.

Their rights and duties, he declared, were mutual and the sooner they understood them the better it would be for both. The scene was a novel one. Those who were lately slaves and those who but lately owned them were there as equals before the law, inquiring as to the best policy for governing their common country. "We did not exactly get out of the Union," said he, "though I confess it is somewhat difficult to define precisely where we are. Of one thing I am certain: some of us are trying to get back."

Addressing the colored people he said: "To whom then are you indebted for freedom? To Him in whose hand is power and might * * * You are free men and citizens of the greatest government on earth, clothed with power to protect that freedom, and if you use it aright and not abuse it, the government is on a higher road to prosperity to-day than any she has ever yet traveled. For whatever may have been said in other days, it will hardly be pretended in the light of present events that freedmen, animated by all the hopes of life and knowing that their wives and children enjoy the proceeds of their labor, will not develop the resources of a country faster than slaves who have no objects or aims in life and no incentive to labor save fear. If any portion of my audience has not surrendered old prejudices on this subject, let me inquire of them why have the northern states, with a poorer soil and a colder climate, so far surpassed their southern sisters? Why do the bleak and naturally barren hills of New England bloom like gardens while our fertile slopes are covered with broom sedge and are commonly and properly described as 'old fields?' Why do churches, school houses, railroads, factories, cities and towns exist and flourish there while poverty and pride constitute our fortune here? One is the result of free labor, the other of slavery which has been a blight and a mildew upon every land it has ever touched."

He strongly urged the necessity of industrial education for both races and that machinery and educated labor were

especially needed at that time. "Heretofore," said he, "we have not used the most improved implements of farming but have contented ourselves to drudge along with rude and awkward tools. Those who have experimented with labor-saving machines on the farm have thrown them aside for various reasons, but the truth is, they did not know how to operate them, and when the least part was broken or out of order they could not repair them. To remedy this we must at once educate our laboring classes. We are now taking a new start in the world. The future weal or woe of our country depends upon the foundations we are now laying. If we are to have prosperity we must make up our minds to look at several things in a light very different from that in which we have been accustomed to view them. We must bury a thousand fathoms deep all those ideas and feelings that prompted the cruel laws against teaching these people and must quicken our diligence to see that the means of light and knowledge are placed within the reach of every one of them. Then may we hope that those who were a curse to the country as ignorant slaves will prove a blessing as intelligent freemen."

He discouraged the denunciation of northern men and northern notions. They were what was needed in the south. "We want their capital," said he, "to build factories and workshops and railroads and to develop our magnificent water powers which are to-day monuments of God's bounty and of man's indolence and ignorance. We want their intelligence, their energy and enterprise to operate these factories and to teach us how to operate them * * * In starting afresh, let us start new interests. We can do it by kindly inviting our northern friends who are seeking investments for their surplus capital to come here by showing them that they and their families are welcome in our midst; that we want them here as neighbors and friends and not as enemies. We should never again in public or private indulge in an expression calculated to call up the bitter memories of the past. Let

the dead past bury its dead. Our thoughts and hopes should be on the future. We should teach our people to love the whole Union * * * Sectional appeals are unpatriotic * * * This is a new business and our success and prosperity depend upon the good feeling that ought to exist between the white and the colored people. We want no white party or colored party and I warn my colored friends against that idea. The southern man who says or does anything to create bad feeling towards the North at this critical time is no patriot and the northern man who tries to stir up one portion of our people against the other is equally lacking in patriotism. There is no reason why the two races should be at enmity, but many good reasons why they should be friends. Our common interests demand it and I trust our hearts feel it. Surely slaveowners can entertain no unworthy prejudice against a people who remained with them faithfully to the last and forebore to participate in a struggle which, after 1863, was avowedly for their freedom?"

He advised white men to be kind and just to the negro, to make fair and liberal contracts with him and stand up to him, even to their own hurt. His advice was the same to the colored man. Heretofore he had been given little opportunity to form general character; it would not be so hereafter. The broad world was now before him, and he would soon make some sort of mark upon it. His general bearing and dealings with men would soon make for him a general character. He could make it good or bad just as he saw proper. Honesty, industry, economy, sobriety, truth, virtue and intelligence would secure for him all that any man could desire. He should look to the virtue and integrity of his children and teach them to speak the truth from the time they first began to lisp. * * * The duties and responsibilities of freedom and of citizenship were important and he must now qualify himself to discharge them honestly and intelligently. If he failed to do so he would soon find a level which would not be very much higher than slavery."

Speaking further to the colored men he said: "Let me also say to you, beware of any man, whether of northern or southern birth, who tries to influence your passions and prejudices against the white race or to build up a colored party on these passions and prejudices. He who does it is an enemy alike to the white man and to the colored man and is seeking some personal advantage at the expense of his country, to say nothing of right and wrong. See what madness it would be for you to undertake to form a party on such a basis in North Carolina! You constitute only one-third of our population and unless you can get a large portion of the white people to join you, you will be in a helpless and hopeless minority * * * Let hate and prejudice have no place here. Elevate yourselves but pull nobody else down. Go for the education and progress of mankind without regard to race or color, and invite all to come forward and assist in the development of our common country. These principles are founded upon a rock and cannot be moved."

Except the time he served in the war and in the convention and legislature of 1865-66, Mr. Settle was solicitor of his district continuously from 1861 to 1868. In April, 1868, he was elected Associate Justice of this court and served till his appointment as minister to Peru in February, 1871, when he was succeeded by Nathaniel Boyden. The climate of Peru severely threatened his health. Besides, his heart was with his family and his friends in North Carolina and he was not satisfied to remain away. In the spring of 1872 he resigned and came home. The same year he was chosen president of the National Republican Convention at Philadelphia which nominated General Grant for his second term—the only southern Republican ever honored with the presidency of a national convention of his party. He accepted the distinction, "not so much as a tribute to himself but as the right hand of fellowship extended from our magnanimous sisters of the North to their punished, regenerated, but patriotic sisters of the South." The same year he also be-

came unwillingly the candidate of his party for Congress from the Greensboro district against General James M. Leach, the incumbent, and, after a joint canvass of great ability, was defeated by the narrow majority of 268. Associate Justice Dick having resigned his membership of this court in the summer of 1872, Judge Settle on December the fifth of that year was re-appointed to this court, where he served as Associate Justice till June, 1876, when he resigned to accept the nomination of his party for governor of the state.

Judge Settle was nominated for governor on the twelfth of July, 1876. Governor Vance had already been nominated as the Democratic candidate. Immediately after his nomination Judge Settle announced that he would invite his opponent to a joint discussion. On the fourteenth of July Governor Vance was the guest of the Tilden and Vance Club of Raleigh and had an appointment to speak in that city at eleven o'clock. Judge Settle was also in Raleigh and addressed a note to Governor Vance, asking a division of time on such terms as they might arrange. Governor Vance answered, stating his situation as the guest of the club, but that he was authorized by it to agree to a division of time on this wise: Vance to open in a speech of an hour and a half, Settle to reply in a speech of the same length and Vance to rejoin in a speech of an hour, which should close the discussion. Judge Settle declined any proposition that would not give an equal division of time between the disputants and expressed an anxiety for a joint canvass of the whole state on the usual terms. The notes of each were in fine spirit and admirably courteous, but no joint discussion was arranged that day. The newspapers of the same morning announced appointments of Governor Vance and General Leach to speak in various parts of the state in July and August. Judge Settle, through the chairman of the Republican Executive Committee, asked that these appointments be recalled and arrangements made for a joint discussion in

every county of the state. This was declined by the Democratic chairman on the ground that since the war such had not been the custom but he cheerfully offered to arrange for joint discussions at the times and places designated in the list referred to, which was agreed upon. This is all he would consent to, preferring to leave the matter entirely to the candidates themselves, in accordance with the practice theretofore prevailing in regard to candidates on the state ticket. The candidates agreed on a joint canvass of the state. Their debates are historical in North Carolina. They were conducted with splendid dignity, each candidate treating the other with fine courtesy throughout the discussions. It was a return to the spirit of older times when such men as Graham and Hoke, Gilmer and Bragg, Badger and Miller led the opposing hosts in the field of political contest. In all that makes political speaking instructive, impressive and convincing these discussions were in no respect less masterful than the debates between Lincoln and Douglas in 1858. The sentiment of a large majority of the white people was with Vance. On this account Judge Settle was continually at a disadvantage, but after each debate his political adversaries were forced to acknowledge his power and that there were laurels won on either side. But practically, the joint discussions were disastrous to the Republican cause, just as they were in the campaign with Leach four years before and as they have usually been in the South since the war. The white people were stirred to the depths, as otherwise they might not have been, and they thus became a power so irresistible that only an equal number of white men could withstand them. No braver, fairer, manlier political battle was ever fought on American soil than that which was fought by Judge Settle in 1876. But success was impossible. He was defeated, but in his defeat he received the plaudits and the respect even of his bitterest political foes.

Judge Settle was a personal friend of General Grant.

They had met in Raleigh the last of November, 1865, when General Grant was traveling through the South to ascertain the condition of the southern people and their feeling toward the Union. After Judge Settle's defeat for governor President Grant on January 30, 1877, tendered him the appointment of United States Judge for the District of Florida, which he accepted and filled with great distinction until his tragic death in the judge's room of the government building in the city of Greensboro December 1, 1888.

Judge Settle possessed in an eminent degree the qualities of courage and independence of character. He was bold in the enunciation of his views and fearless in performing the duties of the important positions to which he was called. Though his official stations were occupied for the most part in times trying and troublesome, when men's feelings were most bitter, such were the dignity of his presence and manner, the firmness of his resolution and the magnanimity of his actions that, whether sitting as a judge or presiding over the deliberations of legislatures or conventions, unquestioning obedience was rendered to his authority. So good a heart had he, so kind and benignant were his words and deeds, that even his enemies at last became his friends. At the time of his death, he was the foremost man of his party in the south and the end came when his fine abilities were in their prime. Many eyes all over the country were looking for him to be called to Washington as a member of the Cabinet in the new administration. With his knowledge and ability, and above all with his kind, unselfish heart, he would undoubtedly have accomplished much good for his country.

As a lawyer Judge Settle was fair, able, just and honorable. His mind was quick and he readily caught the point. In statement he was clear and incisive, in argument logical, in manner and expression forcible and effective. As a prosecuting officer he comprehended the depth and meaning of his oath of office and strove to administer the criminal law fairly and impartially—not harshly nor with oppression. He

observed the golden rule of the law: he liver honorably, injured nobody and gave to every one his due. On the bench here and in Florida, he was beloved by his associate judges as well as by the bar and was popular amongst all classes of people. One of the judges who sat with him in this court thus spoke of him: "On the bench his relations with his associates were always cordial and intimate. We regarded him as a younger brother and were greatly aided and benefited by his wise suggestions and well considered counsels in those troublous times that required cautious action, courage of opinion and judicious adjudication in settling new and difficult questions arising out of the disturbed condition of public affairs resulting from the reconstruction of the state government and from the new modes of pleading and procedure in the courts. As a judge he was affable and courteous, patient and attentive in hearing argument, firm and impartial in his rulings. He presided in court with impressive dignity and his integrity was stainless. He possessed in a high degree the genius of common sense and seemed to have an intuitive knowledge of the eternal principles of reason, justice and truth. He relied more upon the principles and reasons of the law than upon the speculative and conflicting decisions of the courts. In any case argued before him his quick and clear apprehension of the merits and the questions of law involved generally enabled him to render a just and correct decision."

Personally Judge Settle was unusually magnetic and loveable. He commanded admiration if not affection instantly and without effort. He was a perfect specimen of a man cast in a mould as perfect as nature ever uses. He was naturally a superb, exquisite gentleman. His features were always illumined with the light of intelligence and the glow of a warm, generous, noble heart. He was tall and erect and his movements were firm, graceful and elastic. His genial presence in the social circle always inspired pleasant thoughts and feelings. The kindliness of his nature was as

diffusive as the sunshine. His manners were easy, cordial, sincere, and provoked a feeling of cheerfulness and happiness in those around him. He had no feeling of envy or jealousy and was free from malice and guile. His humor was sunny and playful and he had a large fund of amusing anecdotes which he appropriately applied to illustrate a story or an argument. His wit was sparkling and racy and, in the excitement of controversy, keen and caustic, but had no venom in its sting. As a conversationalist and companion he had an individuality that was inimitable.

In public life his generosity, courage and intellectual force made him easily a leader among men. Though not at the bar many years he developed forensic powers of the highest order and showed the qualities of a great advocate.

As a politician he was valiant in advocating the principles and policies in which he believed. He was straightforward and truthful in his dealings with his party friends and associates. There was no hypocrisy, deception or double dealing about him. He despised petty politics and refused to submit to the dictation or rule of the petty politician in the guise of a party boss. He believed in government by parties but not solely for parties, and much less for the special benefit of a few in those parties. He was not unduly biased by partisan prejudices or animosities. While firm in his convictions and fearless in the expression of his opinions, he was tolerant of the opinions of others and generous in his judgment of their conduct and purposes.

As a political debater he was powerful and commanding and specially adroit in the conduct of discussions.

As a legislator he possessed a large fund of useful information and practical knowledge. He was familiar with the subjects of legislation and the rules and proceedings of deliberative assemblies over which he presided with charming dignity and impartiality.

His reputation was not confined to the state. He was as well known and as well loved in other states as in North

Carolina. His views upon state and national questions were enlightened, comprehensive and eminently patriotic. He was sanguine in his anticipations of the future and indulged in no gloomy forebodings of coming disaster. Experiences of the past had not caused him to distrust the patriotism, the wise conservatism of the American people. He recognized the fact that time—social and business intercourse, and the pride and love of a common country—had subdued the passions and prejudices of other days; and he believed that such just and liberal policies would be pursued as would shortly overcome all animosities lingering with the people of the two sections of our country and cement them together in the bonds of perpetual friendship and union. His faith in the advancement and glory of the Republic was unfaltering and sublime.

The greatness of men is usually estimated from their public career and services. This is not always a true test. It was in the family and among his intimate friends that the shining qualities of Judge Settle's character were most apparent. His social traits were beyond compare. He had a pleasant word and a kind look and smile for every one. He was benevolent to the poor. His generosity usually outstripped his means. The lowly and humble venerated him for his tender heart. He loved little children and was patient with them. He was not a promoter of strife or discord. He was a peacemaker. He had gathered around him his children and grandchildren and they all looked up to him with pride and affection as their leader and adviser. Yet he was their friend and companion. He was thoughtful for the comfort and happiness of all—of sons and daughters of adult years, and of the little toddlers who understood his gentle word and caress. All knew his unselfishness and loved his patience and charity. To them indeed

> "He lived
> Considerate to his kind. His love bestowed
> Was not a thing of fractions, half-way done,
> But with a mellow goodness like the sun
> He shone o'er mortal hearts, and brought their buds
> To blossom early—thence to fruits and seeds."

A more upright, lovable, chivalric gentleman never lived in this land. May it please your Honors, in behalf of his children, I have the honor to present his portrait to the court.

The Chief Justice in response said:

North Carolina has few statues, but her people have memories and in them long live her illustrious dead. The court gratefully accepts this portrait of an honored member of this bench who served his State with fidelity and marked ability. He lived amid stirring times and when his views on public issues were often bitterly antagonized, but no one ever questioned his ability, his integrity or his patriotism. The youngest man who has ever ascended this bench and a member of one of the most distinguished families of the State, he has shed an added lustre upon both.

Both bench and bar are gratified to see his portrait assume its place on the walls of this chamber by the side of those of Pearson, Reade, Rodman and Bynum, with whom he so long, so well and so faithfully served.

The clerk will note on the records our acceptance of the gift of the portrait, and the marshal will cause it to be hung in its appropriate place.

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ABANDONMENT.

An instruction on the issue of abandonment under section 1832 of The Code, that if the husband "at the time of the execution of the deed in question by his wife, did voluntarily leave his wife, desert her, prior to the time of the execution of the deed, with the intention of forsaking her entirely and never to return," the jury should answer the issue "yes," was correct. *Vandiford v. Humphrey*, 65.

While a safe test of the power of the wife to contract in regard to her separate property as a free trader, when abandoned by her husband, is her right to maintain an action for divorce for like cause; yet she is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. *Vandiford v. Humphrey*, 65.

The statute (Code, section 1832,) does not require the departure of the husband from the State to enable the wife to use her property for her support. *Vandiford v. Humphrey*, 65.

Evidence that the husband was all the time abusing his wife because she would not give him a life estate in the land; that he left and said he was not coming back any more and carried his things and his tools, buggy and harness, bed and bedding and said that he left her for good this time, is sufficient to be submitted to the jury on the issue of abandonment. *Vandiford v. Humphrey*, 65.

ABATEMENT BY DEATH.

Under section 188 of The Code, an action for a penalty, against a register of deeds and the surety on his official bond, abates by the death of the officer. *Wallace v. McPherson*, 297.

ABATEMENT OF NUISANCE. See "Fish and Fisheries."

ABUSE OF LEGAL PROCESS.

In an action for abuse of process, it was not error to give the defendant's prayer "that if the plaintiff assaulted M with his gun, the latter had the right to have him arrested, and the defendant would not then be liable," with the following qualification, "unless the jury further find that M did not have the plaintiff arrested for the assault, but in order to get rid of him so that defendant's work could go on." *Jackson v. Telegraph Co.*, 348.

ABUSE OF LEGAL PROCESS—*Continued.*

An action for damages lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceedings. *Jackson v. Telegraph Co.*, 348.

ABUSE OF PRIVILEGE. See "Argument of Counsel."

ACTION FOR WASTE. See "Waste, Action for"

ACTION TO REMOVE CLOUD ON TITLE. See "Cloud on Title."

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ADMINISTRATION. See "Executors and Administrators."

ADMINISTRATIVE ORDER.

An order of the judge, reversing an order of the clerk with reference to the production of papers, is a discretionary matter, and being an administrative order in the cause, and not affecting the merits, is not *res judicata* and the motion can be renewed and a new order obtained. *Mills v. Lumber Co.*, 524.

ADMISSIONS.

Where, in proceedings under the laws relating to entry of vacant lands, it was admitted by the plaintiffs (protestants) that they could not show possession of any part of the land except during the years 1874-1876, nor any paper writing to any person for any part of the land covered by said entry, except three deeds which failed to connect the plaintiffs in any way with the land, the court properly dismissed the proceedings. *Johnson v. Wescott*, 29.

ADVERSE POSSESSION. See "Deeds;" "Ejectment;" "Estoppel."

In an action of ejectment, an instruction that if the jury should find that plaintiff and those under whom he claimed had been in the exclusive, open, continuous and adverse possession of the land in controversy from 1880 to the bringing of the action, they should answer the issue for the plaintiff, is erroneous, where the plaintiff failed to show any privity in respect to the *locus in quo* between himself and those whose possession preceded his. *Jennings v. White*, 23.

Possessions cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. *Jennings v. White*, 23.

Where, in procedings under the laws relating to entry of vacant lands, it was admitted by the plaintiffs (protestants) that

ADVERSE POSSESSION—*Continued.*

they could not show possessios of any part of the land except during the years 1874-1876, nor any paper writing to any person for any part of the land covered by said entry, except three deeds which failed to connect the plaintiffs in any way with the land, the court properly dismissed the proceedings. *Johnson v. Wescott*, 29.

Where property was conveyed in trust for M during her life, with power of appointment, and on her failure to make the appointment in trust to surrender and deliver up said property to such child, etc., as may be living at her death, and M died in 1903, *held*, that possession by the defendant of said property since 1856, claiming to own the same in fee simple, under a deed from W, who had no title, is adverse to the trustee and bars the plaintiffs, who are the child and grandchild of M. *Kirkman v. Holland*, 185.

Where one has a deed conveying no title, interest or estate, and enters under said deed, claiming to own the land in fee simple, such possession is adverse to the owner. *Kirkman v. Holland*, 185.

Adverse possession, which will ripen a defective title, must be of a character to subject the occupant to action. *Smith v. Proctor*, 314.

A tax title which conveys only the interest of the life tenant, is not color of title against the remaindermen, nor is possession thereunder adverse until the death of the life tenant. *Smith v. Proctor*, 314.

In an action of ejectment, where plaintiff showed possession out of the State by a registered grant made in 1822, and *mesne* conveyances to themselves, with evidence of possession in 1866 and 1867 and from 1889 to 1896, a motion to nonsuit was properly denied, where the action was brought in 1902 and the defendant's possession under color did not become exclusive until 1896. *Lindsay v. Austin*, 463.

In an action of ejectment where at the date of a grant from the State to the defendant, the plaintiffs had failed to show title out of the State either by possession or grant, and also failed to show seven years' possession under color of title since the date of that grant, the court erred in refusing to nonsuit the plaintiffs. *Lindsay v. Austin*, 463.

In an action of ejectment plaintiff makes out a title *prima facie* good against the world when he shows a grant from the State and *mesne* conveyance connecting him with the grant, or by proving title out of the State by grant duly issued or by an

ADVERSE POSSESSION—*Continued.*

adverse possession for 30 years without regard to the number or connection of the tenants, and 20 years' adverse possession in himself, or those under whom he claims or such a possession of 7 years, under color, or by showing 30 years' adverse possession by himself, or by some one person and *mesne* conveyances connecting him with the title thus acquired by that person as against the State, or by showing adverse possession by himself, or those under whom he claims for 21 years, under color. *Campbell v. Everhart*, 503.

It is a general rule that, as between those occupying parental and filial, or *quasi* parental and filial relations, the possession of one is presumed to be permissive and not adverse to the other. *Campbell v. Everhart*, 503.

Where a party takes possession of land under another, he is not allowed to dispute the latter's title until he has given up the possession so acquired, and the rule applies with equal force to a person who continues a possession antecedently held by him with the consent of the party whose title is in question. *Campbell v. Everhart*, 503.

AGENCY. See "Principal and Agent."

AGRICULTURE. See "Lien Bonds."

AMENDMENTS. See "Pleadings."

While this court has the power of amendment, it will not exercise this power where the amendment would, perhaps, present a case substantially different from the one which was tried below and raise a question of law not involved in the present appeal. *Bonner v. Stotesbury*, 3.

In an action for the possession of a mule, it was in the discretion of the court to allow the plaintiff to amend his complaint, which alleged simply ownership and wrongful detention, by setting out allegations of fraud and deceit on the part of the defendant in obtaining possession of the mule in a trade, such amendment being in no sense the introduction of a new cause of action. *Joyner v. Early*, 49.

ANSWER. See "Pleadings."

APPEAL AND ERROR. See "Case on Appeal."

The writ of *habeas corpus* can never be made to perform the office of a writ of error or appeal. The investigation is confined to the question of jurisdiction or power of the judge to proceed as he did, and the merits of the controversy are not passed upon. *Ex Parte McCown*, 95.

APPEAL AND ERROR—*Continued.*

The failure of a justice of the peace to sign the return to notice of appeal does not vitiate the proceedings in the Superior Court, where the appellant had given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the Superior Court at the trial in person and by attorney. *Hawks v. Hall*, 176.

Section 550 of The Code and Rule 27 of this court require an assignment of the errors relied on to be tabulated and inserted in the case on appeal or record, preferably at the end. *Hicks v. Kenan*, 337.

Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 337.

In a proceeding by an administrator to sell land for assets, the clerk made an order of sale in February, 1897, and upon the clerk's minutes appears an entry of appeal by defendants (heirs at law). The land was sold in April, and sale confirmed in May, 1897, and the cause appears for the first time on civil issue docket at January Term, 1899, *held*, that a judgment declaring the sale void, pending the appeal, and directing a re-sale, was error, as the appeal was abandoned. *Love v. Love*, 363.

Merely craving an appeal is not *taking* an appeal. An appellant must look after his case and see that his appeal is made effectual. *Love v. Love*, 363.

Upon appeal from an order of the clerk adjudging the respondent in contempt, there was no error in the judge allowing additional affidavits to be filed on the hearing before him. *In re Scarborough Will*, 423.

An order of the clerk of the court of G. county which adjudged the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on appeal where it appears that the respondent cannot comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of the will and has refused to surrender it to the respondent. *In re Scarborough Will*, 423.

Where a demurrer, in a proceeding for foreclosure upon the ground that the mortgagor, who had assigned his equity of redemption, was not made a party, was sustained, but no order was made directing him to be made a party, or dismissing the action for failure to do so, no appeal lies at this stage, even if such order is prejudicial. *Bernard v. Shemwell*, 446.

APPEAL AND ERROR—*Continued.*

The refusal to grant a motion for a bill of particulars, in an indictment for embezzlement, is not appealable, except possibly in a case of gross abuse of discretion. *State v. Dewey*, 556.

If an appeal from a refusal to grant such application was permissible, it was premature. The defendant should have noted his exception, and if the final judgment was against him, he could have had the refusal reviewed on appeal therefrom. *State v. Dewey*, 556.

Where the defendant had the benefit of the bill of particulars upon a renewal of the motion at a subsequent term, the appeal from a refusal at a previous term is useless. *State v. Dewey*, 556.

It is only where the judgment is final and disposes of the entire controversy that an appeal transfers the cause to the appellate court and disables the court below from proceeding therein, and an exception to a refusal of a continuance because of a pending appeal from a motion for a bill of particulars is without merit. *State v. Dewey*, 556.

The granting or refusal of a continuance is a matter necessarily in the discretion of the trial judge and not reviewable, certainly in the absence of gross abuse of such discretion. *State v. Dewey*, 556.

A motion to dismiss an appeal will be allowed, where the case was tried in October, 1904, and not docketed until the Fall Term, 1905; the appellant's excuse that the "case on appeal" was not settled by the judge till after it was too late to docket at the Spring Term in time for the call of the district to which it belongs, being of no force. *State v. Telfair*, 555.

It is the duty of the appellant to docket the "record proper" in apt time, and upon the call of the district have asked for a writ of *certiorari* to perfect the transcript. *State v. Telfair*, 555.

APPELLANT. See "Appeal and Error."

APPLIANCES. See "Railroads."

APPRAISAL. See "Eminent Domain."

ARGUMENT OF COUNSEL.

In an action on a note given by defendant's intestate, if the plaintiff had undertaken to testify in his own behalf that he had or had not made a demand for payment of the note of the intestate such evidence should on objection have been excluded as incompetent under section 590, and it was not proper for defendant's counsel to comment on the failure of the plaintiff to testify on this question of demand. *Davis v. Evans*, 440.

ARGUMENT OF COUNSEL—*Continued.*

Where counsel for the defendant, in his closing speech to the jury, commented on a fact not relevant to the issue and argued an erroneous proposition of law and this was immediately brought to the attention of the court, both by objection and by a prayer for instruction presented at the time, the failure of the court to advert to the matter either at the time or in the charge was error, which entitles the plaintiff to a new trial. *Davis v. Evans*, 440.

The fact that no objection was made at the time and the court below was not asked to interfere and correct the effect of the denunciation of the solicitor in his argument to the jury, precludes this court from considering it. *State v. Archbell*, 537.

Exceptions relating to the language of counsel must ordinarily be left to the discretion of the trial judge and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury. *State v. Horner*, 603.

Unless an exception to language used by counsel is taken, either at the time the language is used, or by request to the court to instruct the jury that they must disregard the objectionable language, it cannot be assigned as error. *State v. Horner*, 603.

There is a difference between arguments addressed to the jury, which are either illogical or irrelevant, and the use of abusive and degrading epithets or characterization of parties or witnesses. *State v. Horner*, 603.

ARREST.

When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense. *State v. Horner*, 603.

ASSAULTS. See "Deadly Weapons."

Where the respondent visited the judge at his boarding house, during a recess of the court, before the adjournment for the term, and assaulted the judge in consequence of a sentence pronounced at that term, *held*, that within the meaning of the statute, Code, sections 648-654, the conduct of the respondent was a direct contempt of the court as much so as if the assault had been made when the judge was sitting on the bench in open court. *Ex Parte McCown*, 95.

An assault committed by the defendant, a very strong, large and robust man, upon his wife, a very frail and weak woman, who

ASSAULTS—*Continued.*

was sick at the time, with a buggy trace two and a half feet long, is calculated to produce serious injury and possibly death. *State v. Archbell,* 537.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Laws of 1893, chapter 453, section 1, which enacts: "That upon the execution of any voluntary deed of trust, or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once," applies to the sureties upon a note of the assignor. *Pritchard v. Mitchell,* 54.

ASSIGNMENTS OF CAUSES OF ACTION. See "Insurance;" "Real Party in Interest."

ASSIGNMENTS OF ERRORS.

Section 550 of The Code and Rule 27 of this court require an assignment of the errors relied on to be tabulated and inserted in the case on appeal or record, preferably at the end. *Hicks v. Kenan,* 337.

Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. *Hicks v. Kenan,* 337.

ASSIGNMENT OF LIEN BONDS. See "Lien Bonds."

ASSUMPTION OF RISK.

While the mere working on in the presence of known and dangerous conditions, but in the honest effort to discharge his duty faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases against railroads from injuries from defective appliances, the plaintiff is absolved from all care on his own part. *Biles v. Railroad,* 528.

In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the proximate consequence of a defective engine or defective appliances, then the defense of assumption of risk is not open to the defendant, by reason of the Fellow Servant Act. *Biles v. Railroad,* 528.

Except in extraordinary and imminent cases, like those of Greenlee and Troxler cases, the plaintiff in actions for negligence against railroads is required to act with that due care and circumspection which the presence of such conditions require, and if apart from the element of assumption of risk, he has been careless in a manner which amounts to contributory negligence, his action must fail. *Biles v. Railroad,* 528.

ATTORNEY AND CLIENT. See "Argument of Counsel;" "Costs."

Where the defendant trustee in a deed of trust was advised by his attorney that he could not buy at his own sale, and the attorney said that he could not represent him at all if he was expected to represent D, a prospective purchaser, but the attorney prepared the advertisement of sale as a courtesy to defendant, and after that became the attorney of D, having received a letter from the latter requesting that he act for him at the sale, and he further testified that he had completely severed his connection with the plaintiff as his attorney and represented D alone at the sale, it was proper for the court to refuse to instruct the jury that the attorney was in law the attorney of the defendant and D. *Yarborough v. Hughes*, 199.

In an action against the defendant as surety for a defaulting contractor, a charge made by the plaintiff for lawyer's fees was properly disallowed. *Donlan v. Trust Co.*, 212.

A personal representative has the right to employ an attorney whenever it is necessary to protect the estate, or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services. *Kelly v. Odum*, 278.

An executor is always personally liable to his counsel for his fee, but it is in no sense a debt of the estate. *Kelly v. Odum*, 278.

BAGGAGE. See "Carriers."

BANKS AND BANKING. See "Drafts."

Where a bank lends money upon collaterals and comes into court to defend their validity, it is entitled to retain its necessary and reasonable disbursements out of the sum realized upon such collaterals. *Lumber Co. v. Pollock*, 174.

The bank occupied the relation of trustee, and as such it held the collaterals, and it was its duty to protect them. Questions of public policy, such as usury or encouraging litigation, are not involved. *Lumber Co. v. Pollock*, 174.

BILL OF PARTICULARS. See "Embezzlement."

BOND FOR TITLE. See "Reformation and Correction."

BOUNDARIES. See "Deeds."

BRIDGES. See "County Commissioners."

BUILDER'S CONTRACTS. See "Principal and Surety."

BURDEN OF PROOF.

In an action brought by plaintiffs for the purpose of having vacated and cancelled a grant issued to the defendant upon the ground that the land was not the subject of entry and grant as it was swamp land and was vested in the plaintiffs under section 2506 of The Code, an instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is swamp land before they could find for the plaintiffs, was proper, though the plaintiffs were in possession of the land when the suit was commenced. *Board of Education v. Makely*, 31.

The distinction between the burden of the issue and the burden of proof is that the burden of the issue, that is the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. *Board of Education v. Makely*, 31.

To create any liability on the part of the legatee over to the remainderman, there must be proof that the legatee recovered the sum. *Outlaw v. Gardner*, 190.

Although the breach of a specific contract for services rendered to the testator is admitted by the answer, the burden is still on the plaintiff to establish the performance of it on her part, or else that she was prevented from performing it by the testator or those acting for him. *Tussey v. Owen*, 457.

In an action for damages for an injury from a collision, with defendant's train, the burden of proof was upon the plaintiff to show that the alleged negligence of the engineer in not stopping his train sooner than he did was not only the cause, but the proximate cause of the injury. *Kearns v. Railroad*, 470.

In an action for damages for a wrongful discharge, the burden is upon the plaintiff to prove the contract of employment, the discharge by the defendant and the existence and amount of substantial damages. *Eubanks v. Alspaugh*, 520.

The contract of employment and the discharge by the defendant being established, the burden of proving justification is upon the defendant. *Eubanks v. Alspaugh*, 520.

BURDEN OF THE ISSUE. See "Burden of Proof."

BY-LAWS. See "Insurance."

BYNUM, W. P., JR., ADDRESS OF, Presenting Portrait of Judge Thos. Settle, 649.

CANCELLATION OF INSTRUMENTS. "See Reformation and Corrections;" "Fraud."

CANCELLATION OF POLICY. See "Insurance."

CARRIERS. See "Railroads;" "Corporation Commission."

Where goods were placed upon the defendant's wharf and the plaintiff, consignees, were notified of their arrival and paid the freight and commenced to remove them, the defendant's responsibility as a common carrier thereby terminated, and any obligation which remained was that of warehouseman or wharfinger, and the standard of conduct is that of ordinary care. *Stone v. Steamship Co.*, 193.

If a railroad company receives for carriage, from a passenger, trunks containing merchandise or articles other than the personal baggage of the passenger, with knowledge of their contents, it is liable on its contract as an insurer for any loss of, or damage to the property, not resulting from the act of God or the public enemy. *Trouser Co. v. Railroad*, 382.

While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. *Trouser Co. v. Railroad*, 382.

When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. *Trouser Co. v. Railroad*, 382.

Although a carrier has no knowledge of the contents of trunks, which contain samples, yet some care at least should be taken of the trunks after they arrive at their destination, and it has no right to leave them for three days on the platform of its depot exposed to the weather. *Trouser Co. v. Railroad*, 382.

CASE ON APPEAL. See "Appeal and Error;" "Exceptions and Objections."

The appellant's "statement of case on appeal" should not have been sent up by the clerk below, nor have been docketed as part of the transcript here. *State v. Dewey*, 556.

CAVEAT. See "Wills."

CENSUS LISTS.

A census list (found in the clerk's office) was not competent evidence to show that one of the grantees was not *in esse* at the date of the deed—census reports being competent only to prove facts of a public nature. *Campbell v. Everhart,* 503.

CERTIORARI. See "Appeal and Error."

CHARGE IN WRITING. See "Instructions."

CITIES. See "Municipal Corporations."

CLAIM AND DELIVERY.

In an action for the possession of a mule, it was in the discretion of the court to allow the plaintiff to amend his complaint, which alleged simply ownership and wrongful detention, by setting out allegations of fraud and deceit on the part of the defendant in obtaining possession of the mule in a trade, such amendment being in no sense the introduction of a new cause of action. *Joyner v. Early,* 49.

CLEAR PROCEEDS. See "Fines;" "Penalties."

By "clear proceeds" is meant the total sum less only the sheriff's fees for collection, when the fine and costs were not collected in full. *State v. Maultsby,* 583.

CLERKS OF THE COURT. See "Courts, Powers of; "Executors and Administrators."

CLOUD ON TITLE.

In an action brought by plaintiffs for the purpose of having vacated and cancelled a grant issued to the defendant upon the ground that the land was not the subject of entry and grant as it was swamp land and was vested in the plaintiffs under section 2506 of The Code, an instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is swamp land before they could find for the plaintiffs, was proper, though the plaintiffs were in possession of the land when the suit was commenced. *Board of Education v. Makely,* 31.

CODE, THE. See "Acts;" "Legislature."

Sec.
56. Action to Establish Lost Deed. *Jones v. Ballou,* 526.
132. Court, i. e., Clerk or Judge. *Mills v. Lumber Co.,* 525.
141. Limitations of Actions. *Lindsay v. Austin,* 469.
146. Possession Presumed. *Kirkman v. Holland,* 189.

CODE, THE—*Continued.*

Sec.
152 (3). Mortgagor and Mortgagee. *Bunn v. Braswell*, 139.
155 (9). Fraudulent Concealment. *Bonner v. Stotesbury*, 8.
162. Non-Residents. *Green v. Ins. Co.*, 311.
177. Real Parties in Interest. *Cunningham v. R. R.*, 429.
177. Real Party in Interest. *Tyson v. Joyner*, 73.
177. Equitable Title. *Walker v. Miller*, 456.
181. Guardian *ad Litem*. *Carraway v. Lassiter*, 152.
188. Action for Penalty Abates. *Wallace v. McPherson*, 298.
192. Venue. *Propst v. R. R.*, 398.
194. Venue. *Propst v. R. R.*, 398.
217. Service of Summons. *Higgs v. Sperry*, 301.
233 (3). Prayer for Relief. *Jones v. Ballou*, 527.
239 (4). Misjoinder. *Pritchard v. Mitchell*, 56.
273. Parties. *Bernard v. Shemwell*, 447.
413. Opinion on Facts by Judge. *Campbell v. Everhart*, 516.
413. Opinion on Facts by Judge. *Kearns v. R. R.*, 483.
414. Charge in Writing. *State v. Dewey*, 560-1-4.
525-6. Costs. *Williams v. Hughes*, 18.
527. Costs on Appeal. *Williams v. Hughes*, 18.
540. Costs on Appeal. *Williams v. Hughes*, 18.
550. Case on Appeal. *Hicks v. Kenan*, 338.
575. Tender of Judgment. *Hall v. Tel. Co.*, 373.
578. Production of Papers. *Mills v. Lumber Co.*, 524.
590. Transaction with Deceased. *Davis v. Evans*, 441.
590. Transaction with Deceased. *Bonner v. Stotesbury*, 6.
590. Transaction with deceased. *Stocks v. Cannon*, 62.
590. Transactions with Deceased. *Davidson v. Bardin*, 2.
648-4. Contempt. *In re Scarborough Will*, 425.
836-7. Title to Real Estate Involved. *Hudson v. Hodge*, 308.
878-9. Return to Notice of Appeal. *Hawks v. Hall*, 178.
896. When Prisoner Bound Over. *State v. Lucas*, 569.
1014. Embezzlement. *State v. Dewey*, 563.
1049-50. Gambling. *Daniels v. Homer*, 252.
1090. Failure to Discharge Duty. *Glenn v. Comrs.*, 418.
1152-6-7. When Prisoner Bound Over. *State v. Lucas*, 569.
1161. Recognizances. *State v. Lucas*, 569.
1254. Registration. *Hinton v. Moore*, 47.
1275. Registration. *Hinton v. Moore*, 47.
1280. "Heirs." *Smith v. Proctor*, 318.
1292. Action for Support. *Bidwell v. Bidwell*, 403.
1297. Drainage Laws. *Porter v. Armstrong*, 180.
1328. Unborn Children. *Campbell v. Everhart*, 512.
1329. Heirs of Living Persons. *Campbell v. Everhart*, 510.
1436. Sale of Land to Make Assets. *Carraway v. Lassiter*, 147.
1490-91. Survival of Action. *Wallace v. McPherson*, 298.

CODE, THE—*Continued.*

Sec.
1498. Death by Wrongful Act. *Byrd v. Express Co.*, 277.
1498-9. Death by Wrongful Act. *Carter v. R. R.*, 500.
1524. Executors and Administrators. *Kelly v. Odum*, 280.
1552. Statute of Frauds. *Sheppard v. Newton*, 535.
1799. Lien Bonds. *Chemical Co. v. McNair*, 331.
1802. Liens. *Donlan v. Trust Co.*, 212.
1814-16. Marriage Licenses. *Wallace v. McPherson*, 297.
1832. Abandonment. *Vandiford v. Humphrey*, 67.
1945-6. Damages in Condemnation Proc. *State v. Jones*, 620-31.
2033. Road Supervisors. *Cozard v. Hardwood Co.*, 286.
2034. Bridges. *Glenn v. Comrs.*, 421.
2055-7. Cartways. *Cozard v. Hardwood Co.*, 286.
2062-3. Cartways. *Cozard v. Hardwood Co.*, 286.
2154. Production of Wills. *In re Scarborough Will*, 424.
2160. *Caveat. Carraway v. Lassiter*, 156.
2500. Sheep-Killing Dogs. *Daniels v. Homer*, 252.
2506. Swamp Lands. *Board v. Makely*, 34.
2527. Swamp Lands. *Board v. Makely*, 39.
2811-7. Stock Law. *Daniels v. Homer*, 252.

COLLATERALS. See "Banks and Banking;" "Lien Bonds."

COLLISIONS. See "Railroads."

COLOR OF TITLE.

Color of title is a paper writing which professes and appears to pass the title, but fails to do so. *Smith v. Proctor*, 314.

A tax title which conveys only the interest of the life tenant, is not color of title against the remaindermen, nor is possession thereunder adverse until the death of the life tenant. *Smith v. Proctor*, 314.

COMMENT OF COUNSEL. See "Argument of Counsel."

COMPLAINTS. See "Pleadings."

CONDEMNATION PROCEEDINGS. See "Eminent Domain."

COOLING TIME. See "Homicide."

CONDITIONS IN RESTRAINT OF ALIENATION. See "Wills."

CONFESSIONS.

Confessions, obtained by threats, or inducements held out, to persons under arrest, or surrounded with a number of pursuers or otherwise so situated as to render it doubtful whether they were freely and voluntarily made cannot be used against a person charged with a crime. *State v. Horner*, 603.

CONFESSIONS—*Continued.*

Where, however, it appears that no inducements were offered the prisoner and no threats made, and after the arrest he was treated kindly, and did not seem to be excited or afraid, and began the conversation on the way to jail, with those who had arrested him, the fact that the prisoner was tied and had been shot by those who arrested him and two men were in the wagon with him and three or four others following, does not render his confession made under such circumstances, inadmissible. *State v. Horner*, 603.

CONNOR ACT.

The Connor Act (Laws 1885, chapter 147,) applies both to lost and unlost deeds executed after December 1, 1885, and there was no error in rejecting parol evidence to show that plaintiff's grantor deeded the land in controversy to W in 1891, and that said deed had been lost before registration, where plaintiff was a purchaser for value of said title under registered conveyances. *Hinton v. Moore*, 44.

CONSENT JUDGMENTS. See "Judgments."

CONSIDERATION.

Indulgence or extension of time for payment of a debt, constitutes a valuable consideration. *Chemical Co. v. McNair*, 326.

CONSTITUTION OF N. C. See "Constitutional Law."

Art.
I, sec. 17. Due Process of Law. *Daniels v. Homer*, 237.
I, sec. 19. Trial by Jury. *Kearns v. Railroad*, 482.
I, sec. 37. Powers Not Delegated. *Daniels v. Homer*, 237.
IV, sec. 2. Courts. *Ex Parte McCown*, 105.
IV, sec. 12. Courts. *Ex Parte McCown*, 105.
VI, secs. 1-4. Qualifications of Voters. *Clark v. Statesville*, 492.
IX, sec. 5. Fines and Penalties. *State v. Maultsby*, 584.
IX, sec. 10. Swamp Lands. *Board v. Makely*, 34.

CONSTITUTIONAL LAW.

At common law, the conduct of the respondent constitutes a contempt of court, and if the statute, Code, sections 648-654, does not embrace this case and in terms repeals the common law applicable to it, this court would not hesitate to declare the statute in that respect unconstitutional. *Ex Parte McCown*, 95.

The contention that our drainage laws (chapter 30 of The Code, and amendments thereto,) are unconstitutional, in that the land is to be taken for a mere private purpose, is without merit. *Porter v. Armstrong*, 179.

CONSTITUTIONAL LAW—*Continued.*

Chapter 292 of the Acts of 1905, making it unlawful to set or fish any nets in certain sections of Albemarle and Pamlico Sounds, from January 15 to May 15 in each year, and providing that any person who shall violate said act shall be guilty of a misdemeanor, and further providing that the Oyster Commissioner shall seize all nets setting or being used in violation of said act, sell the same at public auction and apply the proceeds to the payment of cost of removal and pay any balance to the school fund, is a constitutional exercise of the police power. *Daniels v. Homer*, 219.

The amendment made to sections 2056-2057 of The Code, by chapter 46, Laws of 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional, in that private property can only be taken for a public use. *Cozard v. Hardwood Co.*, 283.

The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever requirel by the statutes regulating the registration of voters. *Clark v. Statesville*, 490.

The making of a permanent roll or record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear thereon are not required to have the educational qualification. *Clark v. Statesville*, 490.

The Legislature has power to give "penalties," which must be sued for, either wholly or in part to whomsoever shall sue for the same, and only the clear proceeds of such as accrue to the State go to the school fund under the provision of Art. IX, sec. 5, of the Constitution. *State v. Maultsby*, 583.

The provision in chapter 125, Laws 1903, that the informant "shall receive one-half of the fine imposed" is unconstitutional and there was no error in refusing the petition of the informant for one-half of a fine imposed for selling liquor contrary to its provisions. *State v. Maultsby*, 583.

The Charter of Creedmoor (chap. 398, Private Laws 1905,) with reference to condemnation of streets, which provides for notice when the landowner's property is to be appraised and his compensation fixed, is valid though it makes no provision for notifying him of contemplated action by the commissioners. *State v. Jones*, 613.

CONSTITUTIONAL LAW—*Continued.*

The provision of the Charter of Creedmoor that one of the appraisers shall be appointed by the commissioners and giving the landowner the right to appoint one and those two shall select a third, with a right of appeal to the Superior Court, is valid, though it omits to provide for the appointment of an appraiser if the landowner refuses and though all the appraisers are freeholders of the town. *State v. Jones*, 613.

Chapter 259, Laws 1905, prescribing a method for working the roads in Hertford County and providing in section 17 thereof that any person desiring to use the roads of a township for the carrying on of his business of hauling mill logs or other heavy material with log wagons or other heavy vehicles, shall first obtain a license by paying an annual license tax to the board of supervisors, and further providing that any person violating this section shall be guilty of a crime and liable to a penalty, deprives no citizen of any right to use the highway. It does not restrain trade, nor is it oppressive, but exceedingly equitable. *State v. Holloman*, 642.

CONTEMPTS.

The power to attach for a certain class of contempts being inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise. *Ex Parte McCown*, 95.

The Act of 1871, as brought forward in The Code, sections 648-654, is, in respect to the law of contempt, as broad and comprehensive in its scope and meaning as the common law itself, so far as it relates to those "inherent powers of the courts, which are absolutely essential in the administration of justice." *Ex Parte McCown*, 95.

Where the respondent visited the judge at his boarding house, during a recess of the court, before the adjournment for the term, and assaulted the judge in consequence of a sentence pronounced at that term, *held*, that within the meaning of the statute, Code, sections 648-654, the conduct of the respondent was a direct contempt of the court as much so as if the assault had been made when the judge was sitting on the bench in open court. *Ex Parte McCown*, 95.

At common law, the conduct of the respondent constitutes a contempt of court, and if the statute, Code, sections 648-654, does not embrace this case and in terms repeals the common law applicable to it, this court would not hesitate to declare the statute in that respect unconstitutional. *Ex Parte McCown*, 95.

CONTEMPTS—*Continued.*

In direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus*, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal. *Ex Parte McCown*, 95.

An order of the clerk of the court of G. county which adjudged the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on appeal where it appears that the respondent cannot comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of the will and has refused to surrender it to the respondent. *In re Scarborough Will*. 423.

Upon an appeal from an order of the clerk adjudging the respondent in contempt, there was no error in the judge allowing additional affidavits to be filed on the hearing before him. *In re Scarborough Will*, 423.

In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and cannot be passed upon. *In re Scarborough Will*, 423.

CONTINGENT REMAINDERS. See "Remainders."

CONTINUANCE.

It is only where the judgment is final and disposes of the entire controversy that an appeal transfers the cause to the appellate court and disables the court below from proceeding therein, and an exception to a refusal of a continuance because of a pending appeal from a motion for a bill of particulars is without merit. *State v. Dewey*, 556.

The granting or refusal of a continuance is a matter necessarily in the discretion of the trial judge and not reviewable, certainly in the absence of gross abuse of such discretion. *State v. Dewey*, 556.

CONTRACTS. See "Fraud."

While a safe test of the power of the wife to contract in regard to her separate property as a free trader, when abandoned by her husband, is her right to maintain an action for divorce for like cause; yet she is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. *Vandiford v. Humphrey*, 65.

CONTRACTS—*Continued.*

Growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Hawkins v. Lumber Co.*, 160.

All contracts and by-laws of an incorporated society are made with reference to the general law, and they must conform to certain general requirements in respect to vested personal and property rights of members. *Sherrod v. Insurance Asso.*, 167.

The complaint averring that the contract was made in Virginia, the rights of the parties will be determined by the laws of Virginia, so far as the same apply. *Hall v. Telegraph Co.*, 369.

A contract by the defendant to deliver to the plaintiff lien bonds for an amount sufficient to secure the payment of his notes, vests in the plaintiff, as against the defendant, title to five lien bonds actually delivered in pursuant of said contract, though no specific bonds were mentioned and two of those delivered had not been executed at the date of the contract. *Chemical Co. v. McNair*, 326.

A contract to assign as collateral security "all accounts whatever owing to me as evidenced by my book of accounts," with an agreement "to furnish a full and complete list of said accounts," does not pass accounts not on the list furnished. *Chemical Co. v. McNair*, 326.

Where C agreed to sell the guano of O and deliver to O notes of the planters to whom he sold, to be held by O as collateral security, and that all proceeds of guano sold were to be held by C in trust for the payment of his notes, O is entitled to the proceeds of the notes paid to the defendants as against the plaintiff to whom the lien bonds securing said notes were assigned, though the plaintiff had no notice of O's claim. *Chemical Co. v. McNair*, 326.

Where a contract which was intended to be a satisfaction of all notes, drafts and accounts of plaintiff's creditors, was signed by defendant's intestate "representing A," who did not hold any such claim, but only was an endorser on plaintiff's notes to A, the fact that the intestate's name appears in the body of the contract does not impose a personal liability upon him. *Hicks v. Kenan*, 337.

Where an agent acts within the scope of his authority and professes to act in the name and behalf of his principal, he is not personally liable. *Hicks v. Kenan*, 337.

Where the question of agency in making a contract arises there is a distinction between instruments under seal and those not under seal. In the former case, the contract must be in the

CONTRACTS—*Continued.*

name of the principal and must purport to be his deed. In the latter, the question is always one of intent, and when the meaning is clear, it matters not how it is phrased nor how it is signed. *Hicks v. Kenan*, 337.

The courts seek to sustain and enforce contracts of mutual insurance companies, by looking to the substance and intention, rather than by adopting a technical or strained construction. *Perry v. Insurance Asso.*, 374.

The law will not permit persons to hold themselves out as officers of a corporation, make contracts, assume liabilities, receive money, etc., and avoid all responsibility by simply denying the existence of the corporation, or the agency through which it professes to act. *Perry v. Insurance Asso.*, 374.

A board of commissioners has no power to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. *Glenn v. Commissioners*, 412.

Where a cause of action is not against the defendant as a common carrier, but for that while the cotton was in a compress building belonging to J awaiting compression and shipment, it was burned by the negligence of the defendant, a contract, between plaintiff and insurance brokers, to which the insurance companies were not parties, to make an advance "pending collection from carrier or other bailee," has no application. *Cunningham v. Railroad*, 427.

In an action to recover on a specific contract for services rendered to the testator, where the complaint failed to allege in specific terms that the plaintiff fully performed the contract on her part, or that she was prevented from performing it by the testator, or by those authorized to act for him, it should be redrafted as to those particulars or properly amended. *Tussey v. Owen*, 457.

In an action to recover on a specific contract for services rendered by plaintiff to her father, the proper issue as to the amount of recovery is "what sum, if any, is plaintiff entitled to recover. *Tussey v. Owen*, 457.

Although the breach of a specific contract for services rendered to the testator is admitted by the answer, the burden is still on the plaintiff to establish the performance of it on her part, or else that she was prevented from performing it by the testator or those acting for him. *Tussey v. Owen*, 457.

CONTRACTS—*Continued.*

Where the plaintiff agreed to remain with her father and work for him during his life time, and in consideration thereof he agreed to devise her one-fourth of his estate, evidence that fifteen months before his death, the plaintiff married and removed to another State, is an abandonment of the contract, and she could only recover on the contract by showing some legal excuse for non-performance, and her testimony that she did not go back after she got married, they did not want her to go back, would not justify a finding that she was prevented by her father from performing the contract. *Tussey v. Owen,* 457.

A party to a contract cannot maintain an action for its breach without averring and proving a performance for his own antecedent obligations arising on the contract or some legal excuse for a non-performance thereof. *Tussey v. Owen,* 457.

While in some cases, a recovery is permitted upon a *quantum meruit,* when a recovery could not be had upon the contract for the contract price, yet no recovery can be had for the contract price unless the contract has been performed. *Tussey v. Owen,* 457.

In an action for damages for wrongful discharge, the burden is upon the plaintiff to prove the contract of employment, the discharge by the defendant and the existence and amount of substantial damages. *Eubanks v. Alspaugh,* 520.

The contract of employment and the discharge by the defendant being established, the burden of proving justification is upon the defendant. *Eubanks v. Alspaugh,* 520.

CONTRACTS OF MARRIED WOMEN. See "Abandonment."

CONTRIBUTORY NEGLIGENCE. See "Negligence."

Except in extraordinary and imminent cases, like those of Greenlee and Troxler cases, the plaintiff in actions for negligence against railroads is required to act with that due care and circumspection which the presence of such conditions require, and if apart from the element of assumption of risk, he has been careless in a manner which amounts to contributory negligence, his action must fail. *Biles v. Railroad,* 528.

The violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. *Biles v. Railroad,* 528.

CORPORATION COMMISSION.

The Legislature has the power to supervise, regulate and control the rates and conduct of common carriers, and this regulation may be exercised either directly or through a commission. *Corporation Commission v. Railroad,* 126.

Under the act creating the Corporation Commission, it has the power to require a railroad to put in track scales at such points as the quantity of business may justify it. *Corporation Commission v. Railroad,* 126.

This power cannot be unreasonably exercised, and such orders are subject to review by the Superior Court and by this court. *Corporation Commission v. Railroad,* 126.

The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in. *Corporation Commission v. Railroad,* 126.

Where there was evidence that the defendant had put in track scales at other points where fewer car loads were shipped, and that the petitioner paid annually $30,000 in freight and that the defendant offered to put them in if the petitioner would pay higher rates (amounting annually to $950, nearly the full cost of scales and of putting them in,) than was paid by shippers at points where scales had been put in, *held,* that the evidence was sufficient to be submitted to the jury, on the reasonableness and necessity of the order. *Corporation Commission v. Railroad,* 126.

The fact that the petitioner would cut and ship lumber only two more years from that point does not *per se* make the order unreasonable, when the petitioner had already shipped from that point for five years and had ten years' cutting at another station on the defendant's road, to which the scales could then be moved. *Corporation Commission v. Railroad,* 126.

It is not the number of shippers, but the number of car loads to be weighed which is the test whether it is reasonable to have facilities for weighing car loads upon track scales at a station, and it is immaterial that the petition affected only one point and one shipper. *Corporation Commission v. Railroad,* 126.

CORPORATIONS. See "Insurance."

All contracts and by-laws of an incorporated society are made with reference to the general law, and they must conform to certain general requirements in respect to vested personal and property rights of members. *Sherrod v. Insurance Asso.,* 167.

CORPORATIONS—*Continued.*

Under section 217 of The Code, a traveling auditor of a foreign corporation, which had ceased to do business in the State, is not an officer upon whom process can be served. *Higgs v. Sperry*, 299.

A traveling auditor of a foreign corporation, who presented an account to the plaintiff and requested payment to himself, but received no money and presented the account without authority, is not a "local agent" (under section 217 of The Code) for the purpose of service of summons. *Higgs v. Sperry*, 299.

Under section 162 of The Code, the statute of limitations does not run in favor of a non-resident, whether it is an individual or a corporation. *Green v. Insurance Co.*, 309.

The law will not permit persons to hold themselves out as officers of a corporation, make contracts, assume liabilities, receive money, etc., and avoid all responsibility by simply denying the existence of the corporation, or the agency through which it professes to act. *Perry v. Insurance Co.*, 374.

Neither officers nor members of corporations can evade their plain duty to those with whom contracts are made, by dissolving the organization and leaving creditors unprovided for. *Perry v. Insurance Co.*, 374.

The plaintiff cannot hold the officers of the defendant association personally liable for his judgment against it, because they procured its dissolution and the formation of a new company. *Perry v. Insurance Co.*, 374.

Chapter 367, Acts 1905, amending section 192 of The Code, with reference to the place of trial of actions against railroads, applies to all railroads, both domestic and foreign. *Propst v. Railroad*, 397.

The amendment of 1905 does not repeal section 194, but the latter will be confined to corporations, other than railway companies, which have been chartered by any other State, government or country. *Propst v. Railroad*, 397.

An officer of a foreign corporation coming into this State and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business of hiring hands," etc., and is not liable for the tax on emigrant agents, under Revenue Act of 1905. *Lane v. Commissioners*, 443.

CORROBORATIVE TESTIMONY.

In an action for malicious prosecution, the declarations of defendant at the time he sued out the warrant of arrest and accompanying that act, are competent as part of the *res gestae*, and also as corroborative testimony. *Merrell v. Dudley*, 57.

COSTS.

When at the first trial of the case judgment was entered for the defendants and the plaintiff appealed and a new trial was granted, and at the second trial, the defendants again recovered and in the judgment, the plaintiff was taxed with all the costs of the defendants in the action, except the costs of appeal, *held*, the plaintiff's exception to the judgment upon the ground that he was not taxable with any of the costs of the first trial, was without merit; sections 525-6 and 540 of The Code, relating to taxation of costs, refer to a final recovery upon the merits. *Williams v. Hughes*, 17.

Where the complaint did not set out any cause of action in favor of one of the plaintiffs, the court properly allowed such plaintiff to submit to a nonsuit, it being simply a case of misjoinder of parties plaintiff which may be corrected by taxing him with such costs as are incurred by the misjoinder. *Pritchard v. Mitchell*, 54.

Where an administrator c. t. a. made no defense to a suit brought by his father, but permitted judgment to be taken by default, and then brought a proceeding to charge the land of his testator with the payment of the judgment thus obtained, and two juries decided that there was nothing due to his father, *held*, that is was error to tax against the defendant, who was a purchaser from the devisees, as a part of the costs, an allowance for attorney's fee paid by the administrator for bringing and prosecuting the latter proceeding. *Kelly v. Odum*, 278.

CO-TENANTS. See "Tenants in Common."

COUNTIES. See "County Commissioners;" "Roads."

COUNTY COMMISSIONERS. See "Roads."

A board of commissioners has no power to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. *Glenn v. Commissioners*, 412.

Where a citizen at his own expense constructed a bridge and opened up the public roads over his lands leading to the bridge on both sides of the river and the board of commissioners accepted said bridge as a public bridge and have kept it in repair ever since, the fact that the commissioners paid him only a part of the cost of its construction did not change its character as a part of the public highway, subject to the control of the commissioners, as all other bridges in the country. *Glenn v. Commissioners*, 412.

COUNTY COMMISSIONERS—*Continued.*

The plaintiff is not entitled to a mandamus commanding the board of commissioners to repair the bridge. *Glenn v. Commissioners*, 412.

A citizen is not entitled to an injunction restraining a board of commissioners from proceeding to erect a bridge across a river at a certain point, though there is no public highway leading to such point, where the court finds that the board has in contemplation the opening of a public road to such point, and that arrangements have been made for that purpose. *Glenn v. Commissioners*, 412.

The order in which work upon the public highways is to be performed is within the sound discretion of the county commissioners and a finding by the court that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of the people of the county, excludes any interference by the courts. *Glenn v. Commissioners*, 412.

COURTS, POWER OF. See "Amendments."

The power to attach for a certain class of contempts being inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise. *Ex Parte McCown*, 95.

The Superior Court has independently of The Code, the power to appoint a guardian *ad litem* for an infant defendant, and it may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person, and the clerk who acts as and for the court may do the same in special proceedings pending before him. *Carraway v. Lassiter*, 145.

In a special proceeding by an executor to sell lands, the clerk has power to appoint a guardian *ad litem* for an infant defendant, where the executor was the general guardian of such infant. *Carraway v. Lassiter*, 145.

The order in which work upon the public highways is to be performed is within the sound discretion of the county commissioners and a finding by the court that they have exercised this discretion honestly and in a manner which they conceived to be for the best interests of the people of the county, excludes any interference by the courts. *Glenn v. Commissioners*, 412.

Upon appeal from an order of the clerk adjudging the respondent in contempt, there was no error in the judge allowing additional

COURTS, POWER OF—*Continued.*

affidavits to be filed on the hearing before him. *In re Scarborough Will*, 423.

The court may at any time before or after judgment direct other persons to be made parties to the end that substantial justice be done. *Walker v. Miller*, 448.

COVENANTS OF WARRANTY.

Where, in an action for breach of covenants of warranty contained in two deeds, one executed in 1886 and the other in 1895, the plaintiff recovered all that he was entitled to recover for breach of the covenant in the deed of 1895, his exception to the ruling that he could not recover on the covenant contained in the deed of 1886, is without merit, where the deed of 1886 does not purport to convey any part of the land from which the plaintiff has been legally evicted, as the warranty can extend no further than the land described in the deed containing the warranty. *Dixon v. Jones*, 75.

An estoppel works upon the estate which the deed purports to convey and binds an after acquired title as between parties and privies. In cases where the deed contains a warranty, the grantee and those claiming under him will not be remitted to an action on the covenant for damages. *Weeks v. Wilkins*, 215.

CRIMINAL STATUTES.

The rule that criminal statutes are to be strictly construed, applies when the scope of the act is doubtful and does not mean that a word is to be given a different meaning in a criminal action from that which would be given it in a civil proceeding. *State v. Sutton*, 574.

CUSTOM.

While neither usage or custom, as a general rule, will sanction or excuse an act which the law condemns as negligent, it is pertinent evidence on the question whether there has been negligence in a given case. *Stone v. Steamship Co.*, 193.

DAMAGES. See "Telegraphs."

Where the defendant obtained possession of a mule in a trade with the plaintiff by false, fraudulent and deceitful representations, the plaintiff may sue for damages for the false warranty, or repudiate the trade and sue to recover the specific property. *Joyner v. Early*, 49.

The addressee of a telegram, where there has been a wrongful failure to deliver, or negligent error in transmission, may, under certain circumstances, recover compensatory damages for

DAMAGES—*Continued.*

mental anguish, where the message is for his benefit or concerns his domestic or social interests, and this independent of any bodily or substantial pecuniary injury. *Dayvis v. Telegraph Co.*, 79.

In cases for mental anguish, in awarding the damages to be recovered, the law governing cases for breach of contract applies. *Dayvis v. Telegraph Co.*, 79.

A telegraph company is liable in damages for the mental anguish suffered by the husband by reason of the company's default in failing to deliver a message sent by the wife who had taken the wrong train, informing him of this fact, the purpose of the message being to prevent anxiety. (*Sparkman v. Telegraph Co.*, 130 N. C., 447, overruled). *Dayvis v. Telegraph Co.*, 79.

Where the plaintiff brings an action under section 1498 of The Code, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. *Byrd v. Express Co.*, 273.

Where the plaintiff voluntarily ceased payment and abandoned his policy, he cannot ask damages for its cancellation. *Green v. Insurance Co.*, 309.

Where the jury found that the defendant's agent arrested the plaintiff not because the plaintiff had assaulted him, but to put him out of the way, and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages were allowable. *Jackson v. Telegraph Co.*, 347.

The jury, in addition to compensatory damages, may award exemplary, punitive or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly or with criminal indifference to civil obligations, or has been guilty of an intentional and wilful violation of the plaintiff's rights. *Jackson v. Telegraph Co.*, 347.

There is no law or practice which will permit a tender of judgment of one dollar as nominal damages as an aid to a defective demurrer. *Hall v. Telegraph Co.*, 369.

If a railroad company receives for carriage, from a passenger, trunks containing merchandise or articles other than the personal baggage of the passenger, with knowledge of their contents, it is liable on its contract as an insurer for any loss of, or damage to the property, not resulting from the act of God or the public enemy. *Trouser Co. v. Railroad*, 382.

DAMAGES—*Continued.*

Under sections 1498-9 of The Code, the question is, did the relatives suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased. *Carter v. Railroad*, 499.

In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of life, business calling or profession, etc., and the amount spent for his family, or those dependent upon him, should not be deducted. *Carter v. Railroad*, 499.

While a landowner is not entitled to notice, when the Legislature, or the commissioners to whom it has delegated its power, appropriates his property to a public use, he is, however, entitled to notice and a hearing when his compensation is fixed. *State v. Jones*, 613.

An assessment for damages in a condemnation proceeding need not be by a jury of twelve freeholders—it is not a controversy within the meaning of the Bill of Rights. *State v. Jones*, 613.

DEADLY WEAPONS. See "Assaults."

Some weapons are *per se* deadly and others, owing to the violence and manner of use, become deadly. *State v. Archbell*, 537.

Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to the jury with proper instructions. *State v. Archbell*, 537.

A deadly weapon is not one that must or may kill. It is an instrument which is likely to produce death or great bodily harm under the circumstances of its use. *State v. Archbell*, 537.

DEATH. See "Railroads;" "Partnership;" "Negligence;" "Abatement by Death;" "Death by Wrongful Act."

DEATH BY WRONGFUL ACT. See "Railroads;" "Negligence."

Where the plaintiff brings an action under section 1498 of The Code, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. *Byrd v. Express Co.*, 273.

In an action for damages for death by wrongful act, an instruction that "whenever an adult has been killed and his adminis-

DEATH BY WRONGFUL ACT—*Continued.*

trator brings suit * * * it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that, it is the duty of the jury to say that he is not entitled to recover anything," is erroneous. *Carter v. Railroad,* 499.

The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. *Carter v. Railroad,* 499.

DEBT OF THIRD PERSON. See "Fraud."

DECEIT. See "Fraud."

Where the defendant obtained possession of a mule in a trade with the plaintiff by false, fraudulent and deceitful representations, the plaintiff may sue for damages for the false warranty, or repudiate the trade and sue to recover the specific property. *Joyner v. Early,* 49.

DECLARATIONS. See "Evidence."

DEEDS. See "Ejectment;" "Estoppel;" "Color of Title;" "Tax Title."

Where the call in a deed is for a certain distance to a known and fixed line of another tract, the distance will be disregarded and the line control, but the court should instruct the jury, as a question of law, what the boundaries are, leaving to them the question where they are. *Jennings v. White,* 23.

Possessions cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. *Jennings v. White,* 23.

Where the entire estate in fee simple, in unmistakable terms, is given the grantee both in the premises and the *habendum,* and the warranty is in harmony with the preceding parts of the deed, but following the warranty there is introduced two entirely new clauses, both repugnant to the estate conveyed, *held,* that the repugnant clauses are void. *Wilkins v. Norman,* 40.

Where there are repugnant clauses in a deed, the first will control and the last be rejected. *Wilkins v. Norman,* 40.

While the general rule is that the court will by an examination of the entire deed, seek and if found, effectuate the intention of the grantor, we must keep in mind the other rule that when

DEEDS—*Continued.*

rules of construction have been settled, it is the duty of the court to enforce them, otherwise titles are rendered uncertain and insecure. *Wilkins v. Norman,* 40.

A deed from a trustee which not only refers to the deed of trust as containing the land the trustee sold, but goes on with a fuller description, as follows: "A tract of land up the Mill Pond Road of 60 acres more or less, being all said W owned adjoining R and others' lands," is sufficient to permit parol evidence in aid of the description. *Hinton v. Moore,* 44.

The Connor Act (Laws 1887, chapter 47,) applies both to lost and unlost deeds executed after December 1, 1885, and there was no error in rejecting parol evidence to show that plaintiff's grantor deeded the land in controversy to W in 1891 and that said deed had been lost before registration, where plaintiff was a purchaser for value of said title under registered conveyances. *Hinton v. Moore,* 44.

A deed purporting to convey land "lying and being on the south side of Pamlico river and the south side of Blount's creek, containing 75 acres, be the same more or less, it being the same land Jas. Peele conveyed to Hiram Edgerton by deed, which deed will more fully show courses and distances, references being had to the said deed, and deeded by the said Hiram Edgerton to William E. Shaw," is not void for uncertainty of description, as the deeds referred to can be offered in evidence on the trial and the land probably located. *Moore v. Fowle,* 51.

Description by name, where lands have a known name, is sufficient and a tract of land can be then located by its name. *Moore v. Fowle,* 51.

Where, in an action for breach of covenants of warranty contained in two deeds, one executed in 1886 and the other in 1895, the plaintiff recovered all that he was entitled to recover for breach of the covenant in the deed of 1895, his exception to the ruling that he could not recover on the covenant contained in the deed of 1886, is without merit, where the deed of 1886 does not purport to convey any part of the land from which the plaintiff has been legally evicted, as the warranty can extend no further than the land described in the deed containing the warranty. *Dixon v. Jones,* 75.

Growing timber is a part of the realty, and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Hawkins v. Lumber Co.,* 160.

Where a deed conveys all timber now standing or which may be standing on certain lands during the period of fifteen years

DEEDS—*Continued.*

from and after the time when the grantee shall begin to cut and remove said timber, and the time in which to begin to cut and remove said timber is not limited, and provides by a subsequent clause that the grantor assures unto the grantee the full term of fifteen years, as above set forth, within which to cut and remove the timber hereby conveyed, *held*, that the instrument conveys a present estate of absolute ownership in the timber defeasible as to all timber not removed within fifteen years from the time of commencing to cut, allowing a reasonable time to begin such cutting. (The opinion in *Mfg. Co. v. Hobbs*, 128 N. C., 46, criticised). *Hawkins v. Lumber Co.*, 160.

That part of the deed giving an unlimited time to cut and remove the timber will be rejected because it is indefinite and repugnant to the first part of the stipulation as to time, and because it is contrary to the intent and purpose of the parties as indicated by the entire instrument. *Hawkins v. Lumber Co.*, 160.

Under a deed to "S and wife A, and their heirs, including the former children of said A by another husband," the plaintiffs, who are A's children by the former husband, and were living at the time of the execution of the deed, took as grantees and as tenants in common with S and A. *Darden v. Timberlake*, 181.

The words "and their heirs," in said deed are to be rejected as surplusage, a conveyance to the heirs of a living person being void. *Darden v. Timberlake*, 181.

Where a conveyance is made to the husband and wife and three children, the husband and wife are together seized of one-fourth by entireties, and the children of one-fourth each, and upon the death of the wife, the husband acquires the one-fourth by right of survivorship. (Dictum in *Hampton v. Wheeler*, 99 N. C., 222, corrected). *Darden v. Timberlake*, 181.

Where one has a deed conveying no title, interest or estate, and enters under said deed, claiming to own the land in fee simple, such possession is adverse to the owner. *Kirkman v. Holland*, 185.

An ordinary quitclaim deed, containing no covenants, vests in the grantee only such title as the grantor was seized of at the time of the execution of the deed, and if such grantor subsequently acquires an outstanding title, it does not inure to his grantee in the quitclaim deed, but it is otherwise as to a deed of bargain and sale. *Weeks v. Wilkins*, 215.

A deed conveying "a certain portion of land, adjoining the lands formerly belonging to B and others, on both sides of the road

DEEDS—*Continued.*

leading to N——, to contain forty acres to be taken from the tract where G now resides," is void for vagueness and indefiniteness. *Smith v. Proctor*, 314.

Prior to the Act of 1879 (section 1280 of The Code), the word "heirs" was generally held necessary to create a fee in deeds conveying the legal title, but it was not so in devises nor in equitable estates, where it was generally held that an estate of inheritance would pass without the word "heirs" if such was the clear intent of the parties. *Smith v. Proctor*, 314.

Whenever the word "heirs" appears in an instrument as qualifying the interest of the grantee and indicative of his estate, whether in the premises, the *habendum* or the warranty, same will be transposed and inserted in that portion of the deed which will cause the same to operate as a conveyance of a fee simple interest, when such was the purpose of the grantor. *Smith v. Proctor*, 314.

A deed conveying the legal estate, without the word "heirs" will be held to convey an estate of inheritance if the same on its face contains conclusive, intrinsic evidence that a fee simple was intended to pass and that the word "heirs" was omitted by mistake. *Smith v. Proctor*, 314.

A trustee will take by implication of law a fee in the estate when the duties of the trust require it, although the conveyance is in terms of life estate or fails to use the word "heirs." *Smith v. Proctor*, 314.

Where a deed conveyed a tract of land to a trustee and his survivors, in trust for H during his life, and in the event of H not leaving lawful issue, the trustees to convey to the heirs of G, but in case of lawful issue of H, then the trustees to make title to heir of H, the entire estate passed, the trustee holding for H during his life and then in trust to convey the land to the lawful children of H, and the exigencies of the trust having terminated on the death of H leaving children, the statute will execute the unnecessary portion of the estate. *Smith v. Proctor*, 314.

Where the words "heir of H" in the deed is clearly not intended to denote the whole line of heirs to take in succession as said heirs from "generation to generation," but is simply only a *designatio personae*, meaning lawful child or children of H who may be living at his death, the Rule in Shelly's Case does not apply. *Smith v. Proctor*, 314.

In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action

DEEDS—*Continued.*

should have been brought before the clerk under section 56 of The Code, was properly refused, as that section is an enabling act giving an additional, but not an exclusive remedy. *Jones v. Ballou,* 526.

In an action by plaintiff, who was an illiterate man, to set aside a deed because it was obtained by fraud and without consideration, evidence that the defendant, an educated man and a physician, went to the plaintiff's premises, and representing that he had bought in an old mortgage debt, which plaintiff claimed had been paid, procured from the plaintiff, without any payment to him, the execution of a deed which was written by the defendant and was different from what was represented, and the existence of the mortgage debt was not shown, *held,* the case was properly submitted to the jury. *Hodge v. Hudson,* 358.

A deed made to "Jas. Webb, Jr., & Bro.," a partnership name and style adopted by the distributees and legatees of the deceased partners, is valid, though the partners are not named in the deed, it being a latent ambiguity which may be explained by parol. *Walker v. Miller,* 448.

The general rule is that in order to locate a boundary, the lines should be run with the calls in the regular order from a known beginning, and the test of reversing in the progress of the survey should be resorted to only when the terminus of a call cannot be ascertained by running forward, but can be fixed with certainty by running reversely the next succeeding line. *Lindsay v. Austin,* 463.

Where in the calls of a deed "Beginning at a red oak, John Mullis's corner, about 60 links from said branch and runs north 53 degrees, east 2 chains and 42 links, to a post oak, Jenkins's corner; then north 73 degrees, east 20 chains, to a pine. Jenkins's other corner; then north 47 degrees, west 10 chains to a large rock," etc., there was no evidence to locate the red oak, called for as the beginning, nor the post oak called for as the second corner, but there was evidence to locate the "pine Jenkins's other corner" and the "large rock," an instruction that if the jury find that the large rock is one of the natural objects, etc., "then the plaintiff had the right to reverse the calls in the grant and run from said rock to find the beginning corner," was proper. *Lindsay v. Austin,* 463.

By virtue of section 1329 of The Code, a deed conveying land directly to the "heirs" of a living person, passes whatever title the grantor had to the children of such person. *Campbell v. Everhart,* 503.

DEEDS—*Continued.*

By virtue of section 1328 of The Code, a child if *en ventre sa mere* at the time the deed was executed took as tenant in common with the living children. *Campbell v. Everhart*, 503.

It was error to instruct the jury that the deed was sufficient of itself to vest the title in the grantees therein, where plaintiffs' right to recover was dependent upon evidence that the defendants' grantor was estopped to claim the land, as the credibility of the witnesses was a matter for the jury to pass upon, and the court in deciding this question, invaded their province, contrary to the provision of section 413 of The Code. *Campbell v. Everhart*, 503.

The recital in the deed of plaintiff's grantor that H. (the character of whose possession was at issue) paid her the consideration is not competent against the defendants, nothing else appearing. *Campbell v. Everhart*, 503.

DEFECTIVE APPLIANCES. See "Railroads;" "Assumption of Risk."

DEGREE OF PROOF.

To correct a bond for title on the ground of mistake, the evidence must be strong, clear and convincing, and where there is any evidence to go to a jury on the question, they are to determine under proper instructions whether the evidence is of the character required. *King v. Hobbs*, 170.

DEMURRER. See "Pleadings."

DESCRIPTIONS. See "Deeds."

DISCRETION OF COURT. See "Argument of Counsel;" "Continuances;" "Practice."

DISSOLUTION. See "Corporations."

DIVORCE.

In an action for divorce, where neither party has a domicile in the State of the forum, such court having no jurisdiction of the subject matter of the controversy, a decree of divorce is void, though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court. *Bidwell v. Bidwell*, 402.

Where an action for divorce is instituted and the decree obtained in the State of the plaintiff's domicile, and the defendant has been served with process within the jurisdiction of the forum, or has voluntarily appeared and answered, a decree in such case is valid both *in rem* and *in personam* and will bind and conclude the parties everywhere. *Bidwell v. Bidwell*, 402.

DIVORCE—*Continued.*

In an action for support under section 1292 of The Code, a judgment of nonsuit was proper, where it appeared that the plaintiff, who was at that time domiciled in Massachusetts, brought a suit in that State to obtain an absolute divorce from the defendant, who appeared and answered and set up a decree of absolute divorce of a North Dakota court in bar of the plaintiff's demand, and that the Massachusetts court, after full hearing, dismissed the suit on the ground that the North Dakota decree was valid, and that the status of the parties was not that of husband and wife. ***Bidwell v. Bidwell***, 402.

Where the validity of a divorce had been established by a decree of a competent court, having full jurisdiction in the cause, the plaintiff is estopped from setting up defenses which have been or could have been passed upon and determined in that cause. ***Bidwell v. Bidwell***, 402.

DOCKETING APPEALS. See "Appeal and Error."

DOCTRINE OF SATISFACTION. See "Satisfaction."

DOCUMENTARY EVIDENCE.

Where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case. ***Yarborough v. Hughes***, 199.

Where the pleadings themselves are notice to a party of the importance of certain writings in his possession, as evidence, notice to produce is not necessary. The failure to produce on notice merely increases the strength of the presumption or inference, or adds weight to the evidence, if any, offered by the other side as to their contents. ***Yarborough v. Hughes***, 199.

DRAFTS.

The acceptance of a draft from a debtor does not merge the debt, or operate as a payment unless expressly so understood and agreed. *Chemical Co. v. McNair*, 326.

DRAINAGE LAWS.

The contention that our drainage laws (chapter 30 of The Code, and amendments thereto,) are unconstitutional, in that the land is to be taken for a mere private purpose, is without merit. *Porter v. Armstrong*, 179.

DRAINAGE LAWS—*Continued.*

The Code, chapter 30, and the amendments thereto, are the charts which should guide the commissioners, and that portion of the judge's order, wherein he undertakes to instruct the new commissioners as to their duties, should be set aside. *Porter v. Armstrong*, 179.

The court erred in holding that $100, which was admitted to be a reasonable charge for the plaintiff's services in supervising the completion of the houses, was a proper charge only against the contractor. It was damages chargeable against the defendant surety, and could not be retained by the plaintiff out of the funds due the contractor, in preference to claims for labor and material. *Donlan v. Trust Co.*, 212.

The damage sustained by the plaintiff for loss of rents which he should have received had the contractor completed the houses by the time specified in the contract, directly flows from the breach of the builder's contract, and is within the terms of the defendant's contract of suretyship. *Donlan v. Trust Co.*, 212.

DUE PROCESS OF LAW. See "Constitutional Law;" "Eminent Domain."

Fishing in waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets subject to the right of their owner to contest the fact of his violation of the law by a proceeding of claim and delivery, or by injunction to prevent sale, or by action to recover the proceeds of sale and damages. *Daniels v. Homer*, 219.

DUTY OF APPELLANT. See "Appeal and Error."

EARNINGS. See "Damages."

In ascertaining the net earnings the jury should deduct only the reasonable necessary personal expenses of the deceased, taking into consideration his age, manner of life, business, calling or profession, etc., and the amount spent for his family, or those dependent upon him, should not be deducted. *Carter v. Railroad*, 499.

EAVESDROPPING.

An indictment for eavesdropping was defective which failed to charge that the conduct described was habitual, or facts from which such habit could be inferred, and also failed to allege that anything so heard was repeated in the hearing of divers persons and a motion to quash was properly allowed. *State v. Davis*, 547.

EJECTMENT. See "Deeds."

In an action of ejectment, an instruction that if the jury should find that plaintiff and those under whom he claimed had been in the exclusive, open, continuous and adverse possession of the land in controversy from 1880 to the bringing of the action, they should answer the issue for the plaintiff, is erroneous, where the plaintiff failed to show any privity in respect to the *locus in quo* between himself and those whose possession preceded his. *Jennings v. White*, 23.

In an action of ejectment, the plaintiff who has an equitable interest in the property can recover against a wrongdoer. *Hinton v. Moore*, 44.

In an action of ejectment, where plaintiff showed possession out of the State by a registered grant made in 1822, and *mesne* conveyances to themselves, with evidence of possession in 1866 and 1867 and from 1889 to 1896, a motion to nonsuit was properly denied, where the action was brought in 1902 and the defendant's possession under color did not become exclusive until 1896. *Lindsay v. Austin*, 463.

In an action of ejectment, where at the date of a grant from the State to the defendant, the plaintiffs had failed to show title out of the State either by possession or grant, and also failed to show seven years' possession under color of title since the date of that grant, the court erred in refusing to nonsuit the plaintiffs. *Lindsay v. Austin*, 463.

A plaintiff in order to recover in an action of ejectment, must show a title good against the world or good against the defendant by estoppel. *Campbell v. Everhart*, 503.

In an action of ejectment plaintiff makes out a title *prima facie* good against the world when he shows a grant from the State and *mesne* conveyance connecting him with the grant, or by proving title out of the State by grant duly issued or by an adverse possession for 30 years without regard to the number or connection of the tenants, and 20 years' adverse possession in himself, or those under whom he claims or such a possession of 7 years, under color, or by showing 30 years' adverse possession by himself, or by some one person and *mesne* conveyances connecting him with the title thus acquired by that person as against the State, or by showing adverse possession by himself, or those under whom he claims for 21 years, under color. *Campbell v. Everhart*, 503.

In an action of ejectment, plaintiff makes out a title *prima facie* good against the defendant by showing an estoppel arising out of the fact that the defendant obtained possession of the

EJECTMENT—*Continued.*

land as tenant of the plaintiff, or by his permission, or by connecting the defendant with the common source of title, showing in himself an older or better title from that source. *Campbell v. Everhart*, 503.

ELECTION. See "Wills."

EMBEZZLEMENT.

The refusal to grant a motion for a bill of particulars, in an indictment for embezzlement, is not appealable, except possibly in a case of gross abuse of discretion. *State v. Dewey*, 556.

If an appeal from a refusal to grant such application was permissible, it was premature. The defendant should have noted his exception, and if the final judgment was against him, he could have had the refusal reviewed on appeal therefrom. *State v. Dewey*, 556.

Where the defendant had the benefit of the bill of particulars upon a renewal of the motion at a subsequent term, the appeal from a refusal at a previous term is useless. *State v. Dewey*, 556.

The charge of the court on the question of fraudulent intent is correct within the ruling in *State v. McDonald*, 133 N. C., 690, which was more lenient to the defendant than it would have been had the bill been drawn as authorized by the amendment (Laws 1889, chapter 226,) to section 1014. *State v. Dewey*, 556.

EMIGRANT AGENT.

An officer of a foreign corporation coming into this State and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business of hiring hands," etc., and is not liable for the tax on emigrant agents, under Revenue Act of 1905. *Lane v. Commissioners*, 443.

EMINENT DOMAIN.

The contention that our drainage laws (chapter 30 of The Code, and amendments thereto,) are unconstitutional, in that the land is to be taken for a mere private purpose, is without merit. *Porter v. Armstrong*, 179.

The amendment made to sections 2056-2057 of The Code, by chapter 46, Laws of 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional, in that private property can only be taken for a public use. *Cozard v. Hardwood Co.*, 283.

EMINENT DOMAIN—*Continued.*

The question, what is a public use, is always one of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive. *Cozard v. Hardwood Co.*, 283.

The Charter of Creedmoor, (chap. 398, Private Laws 1905,) with reference to condemnation of streets, which provides for notice when the landowner's property is to be appraised and his compensation fixed, is valid though it makes no provision for notifying him of contemplated action by the commissioners. *State v. Jones*, 613.

While a landowner is not entitled to notice, when the Legislature, or the commissioners to whom it has delegated its power, appropriates his property to a public use, he is, however, entitled to notice and a hearing when his compensation is fixed. *State v. Jones*, 613.

An assessment for damages in a condemnation proceeding need not be by a jury of twelve freeholders—it is not a controversy within the meaning of the Bill of Rights. *State v. Jones*, 613.

The provision of the Charter of Creedmoor that one of the appraisers shall be appointed by the commissioners and giving the landowner the right to appoint one and those two shall select a third, with a right of appeal to the Superior Court, is valid, though it omits to provide for the appointment of an appraiser if the landowner refuses and though all the appraisers are freeholders of the town. *State v. Jones*, 613.

As soon as the commissioners in the exercise of the powers delegated to them appropriated the land to a public street, they had the right to enter and open it without awaiting the payment of damages. *State v. Jones*, 613.

The requirement that the report of appraisers shall lie in the mayor's office for 10 days for purposes of investigation and appeal and that unless an appeal is taken from such report "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid," etc., applies only to the procedure for fixing the price to be paid and means that if no appeal is taken from the appraised value, the land shall stand condemned *at such value* and the appeal does not postpone the right of entry. *State v. Jones*, 613.

EMPLOYER AND EMPLOYEE. See "Master and Servant;" "Railroads;" "Negligence."

ENDORSEMENTS. See "Negotiable Instruments."

ENTIRETIES. See "Tenants by Entirety."

ENTRY OF VACANT LANDS. See "Vacant Lands."

EQUITABLE DEFENSES. See "Negotiable Instruments."

EQUITABLE DOCTRINE OF SATISFACTION. See "Satisfaction."

EQUITABLE TITLE.

The owner of an equitable title may sue in a justice's court for the recovery of crops. *Walker v. Miller*, 448.

ESTATES. See "Wills;" "Deeds;" "Tenants by Entirety."

ESTOPPEL. See "Divorce."

Where the plaintiff in 1863 executed together with six brothers and sisters a deed of bargain and sale for the joint consideration of $1,000, to certain land to the defendant, each grantor undertaking to convey the entire land in fee and the deed containing a joint as well as a several clause of warranty, but the privy examination of three of the grantors, who were married, was not taken; and in 1889 the said married women executed a deed to the plaintiff, *held*, that the plaintiff is estopped from setting up against those claiming under the deed of 1863 the outstanding title thus acquired. *Weeks v. Wilkins*, 215.

An estoppel works upon the estate which the deed purports to convey and binds an after acquired title as between parties and privies. In cases where the deed contains a warranty, the grantee and those claiming under him will not be remitted to an action on the covenant for damages. *Weeks v. Wilkins*, 215.

Where the validity of a divorce had been established by a decree of a competent court, having full jurisdiction in the cause, the plaintiff is estopped from setting up defenses which have been or could have been passed upon and determined in that cause. *Bidwell v. Bidwell*, 402.

A plaintiff in order to recover in an action of ejectment, must show a title good against the world or good against the defendant by estoppel. *Campbell v. Everhart*, 503.

In an action of ejectment, plaintiff makes out a title *prima facie* good against the defendant by showing an estoppel arising out of the fact that the defendant obtained possession of the land as tenant of the plaintiff, or by his permission, or by connecting the defendant with the common source of title, showing in himself an older or better title from that source. *Campbell v. Everhart*, 503.

Where a party takes possession of land under another, he is not allowed to dispute the latter's title until he has given up the

ESTOPPEL—*Continued.*

possession so acquired, and the rule applies with equal force to a person who continues a possession antecedently held by him with the consent of the party whose title is in question. *Campbell v. Everhart*, 503.

When possession is wholly restored to the party who gave it, the estoppel no longer applies, and the party formerly affected by it can stand upon his original right and set up any right or title he may have to the property surrendered. *Campbell v. Everhart*, 503.

EVIDENCE. See "Positive and Negative Testimony;" "Parol Evidence;" "Confessions;" "Documentary Evidence;" "Sufficiency of Evidence;" "Census Lists;" "Deeds;" "Ejectment."

In an action to recover for services rendered the defendant's in testate, the testimony of plaintiff that she "gave him medicine, prepared his nourishment, kept him clean and cared for him generally, he was helpless altogether; we had to do all the services and wait on him," was incompetent under section 590 of The Code, this being a "personal transaction" with deceased. *Davidson v. Bardin*, 1.

Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, *held*, such testimony does not fall within the inhibition of section 590 of The Code, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. *Bonner v. Stotesbury*, 3.

Where a party requests the court to charge the jury that if they believe the evidence they should answer the issue in his favor, the adverse party is entitled to have the evidence considered most strongly in his favor and all facts which it reasonably tends to prove for him must be considered established, and any part of the evidence which tends to disprove the contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit, and where the evidence on the issue was not all one way, the instruction was not a proper one. *Board of Education v. Makely*, 31.

The declarations of a third person to the defendant were properly excluded, where the record shows that the plaintiff was not present. *Joyner v. Early*, 49.

In an action for malicious prosecution, the declarations of defendant at the time he sued out the warrant of arrest and accom-

EVIDENCE—*Continued.*

panying that act, are competent as part of the *res gestae*, and also as corroborative testimony. *Merrell v. Dudley*, 57.

In an action for services rendered the testator of defendant, when the plaintiff testifies as to the value of services "rendered," though he does not state in so many words that he had rendered them to testator, he necessarily speaks, though perhaps indirectly, of a transaction or communication with the deceased, and the testimony is incompetent under section 590 of The Code, which is intended to exclude even the indirect testimony of an interested witness as to a transaction or communication with the deceased, as the latter cannot be heard in reply. *Stocks v. Cannon*, 60.

Evidence that the husband was all the time abusing his wife because she would not give him a life estate in the land; that he left and said he was not coming back any more and carried his things and his tools, buggy and harness, bed and bedding and said that he had left her for good this time, is sufficient to be submitted to the jury on the issue of abandonment. *Vandiford v. Humphrey*, 65.

In an action on a note, it is error to hold that the mere introduction of the note, with the name of an endorsee written on the back, is evidence of its endorsement by such endorsee, so as to vest the legal title in the plaintiff and cut off any defenses against the endorsee, as the signature of the endorsers, where endorsement is required to vest the legal title, must be proved. *Tyson v. Joyner*, 69.

In an action by the plaintiff to recover for mental anguish from the failure of the defendant to deliver the following message sent to him by his wife: "Got left. Be there at 7:30 o'clock tomorrow." Signed "D," the testimony of his wife that when she gave the message to the operator she told him she had been thrown over in Weldon, had two children with her, they were sick, her husband was to meet her and would be worried unless he got the message, is ample to notify the defendant that its failure to deliver the message might result in actionable suffering and mental anguish. *Dayvis v. Telegraph Co.*, 79.

Where there was evidence that the defendant had put in track scales at other points where fewer car loads were shipped, and that the petitioner paid annually $30,000 in freight and that the defendant offered to put them in if the petitioner would pay higher rates (amounting annually to $950, nearly the full cost of scales and of putting them in,) than was paid by shippers at points where scales had been put in, *held*, that the evi-

EVIDENCE—*Continued.*

dence was sufficient to be submitted to the jury, on the reasonableness and necessity of the order. *Corporation Commission v. Railroad,* 126.

A by-law of the defendant company which provided that any member failing to pay his assessment within sixty days from date of notice (which date shall be the day of mailing said notice), shall forfeit all rights in the company, is subject to rebuttal on the part of the plaintiff by showing non-receipt of notice, the defendant having properly postpaid and addressed the same. *Sherrod v. Insurance Asso.,* 167.

To correct a bond for title on the ground of mistake, the evidence must be strong, clear and convincing, and where there is any evidence to go to a jury on the question, they are to determine under proper instructions whether the evidence is of the character required. *King v. Hobbs,* 170.

Where both the plaintiff and defendant testified that before they went to a justice of the peace to have a bond for title written, they had come to a definite contract of sale of the land, and that the timber previously sold and conveyed to a lumber company was excepted, a prayer for instruction "that there was no evidence to show that the clauses exempting from the bond the right and interest of the lumber company in the land were omitted from said bond by the mutual mistake of the parties," was properly denied. *King v. Hobbs,* 170.

Evidence that the trustee had knowledge of a contract entered into between M, under which the property was turned over to the father of W, who was soon in possession of said property, was incompetent. *Kirkman v. Holland,* 185.

Evidence that the trustee from 1855 and up to the death of M made no effort to recover possession of the property because he was told by M not to do so, that she had sold her life estate, but that her daughters would be entitled to the property after her death, was properly excluded. *Kirkman v. Holland,* 185.

Defendant's intestate in January, 1861, was bequeathed, among other legacies, $500 in money to her and her heirs forever, and if she died leaving no child, said money to go to plaintiff's intestate and her heirs. Defendant's intestate died in 1903, leaving no child, and plaintiff's intestate died in 1887. In this action, brought to recover the $500, alleging that the legacy had been paid to defendant's intestate, the following evidence: 1. The will. 2. The inventory and account sale filed in 1861, showing $13,000. 3. Report of commissioner showing that in September, 1863, that there was in the

EVIDENCE—*Continued.*

hands of executors $14,000 due the legatees, none of whom had then been paid. 4. Receipts from two of the legatees in 1868, acknowledging receipt of a much smaller amount than their legacies, in full of all due from said executor, was properly held no evidence of payment of said $500 legacy to defendant's intestate. *Outlaw v. Gardner*, 190.

While neither usage or custom, as a general rule, will sanction or excuse an act which the law condemns as negligent, it is pertinent evidence on the question whether there has been negligence in a given case. *Stone v. Steamship Co.*, 193.

In an action by the plaintiff to recover damages for the death of his intestate, the burden is upon the plaintiff to show that the defendant's alleged negligence proximately caused the intestate's death, and the proof must be of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact. *Byrd v. Express Co.*, 273.

In an action to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant in failing to forward a package of medicine for the intestate who was ill with typhoid fever, where the attending physician testified that he believed the chances of recovery would have been better had the medicine been received in time and taken according to directions, and that was as far as he could go, and that the medicine was needful and necessary, a motion to nonsuit was properly allowed, as the evidence does not tend to show that the failure to receive the medicine caused the intestate's death. *Byrd v. Express Co.*, 273.

In an action for the wrongful cancellation of a policy, the motive or the method of reasoning by which the plaintiff arrived at the conclusion to abandon his policy, was irrelevant. *Green v. Insurance Co.*, 309.

In an action for the wrongful cancellation of a policy, a question whether the plaintiff subsequently took out other insurance in lieu of that which he had abandoned, was properly excluded. *Green v. Insurance Co.*, 309.

The court must be satisfied that an agency has been shown at least *prima facie*, before anything that the alleged agent has said or done can be submitted to the jury as evidence. *Jackson v. Telegraph Co.*, 347.

In an action to set aside a deed for fraud, where the plaintiff had testified that the purport of the deed which was written by the

EVIDENCE—*Continued.*

defendant, was different from what was represented, and the plaintiff could not read, it was competent to ask him, "Who told you that the deed conveyed all your interest in the land," not to prove the declaration of the third party, but to corroborate the plaintiff that as soon as he learned that fact, he put up notices repudiating the deed. *Hodge v. Hudson*, 358.

In an action to set aside a deed for fraud and for want of consideration, endorsements upon a mortgage, which the defendant claimed to have bought in, were properly excluded, the mortgage note not being produced. *Hodge v. Hudson*, 358.

Where the mortgage debt had not been shown or proven, it was not competent to prove a declaration made by R that she owned the debt, nor was the evidence as to the purchase of the mortgage by the defendant from R, who was not shown to have the legal title, competent. *Hodge v. Hudson*, 358.

Where the plaintiff's witness, on cross-examination, testified to the good character of the defendant, a question on re-direct examination, as to whether he had not heard that the defendant had committed certain offenses, was properly excluded. *Coxe v. Singleton*, 361.

Evidence that the roadbed and culvert were built more than forty years ago, and that the water was ponded in a manner substantially similar to that now complained, as much as ten or fifteen years ago, is sufficient to sustain a finding that substantial injury was done prior to five years before action brought, though the plaintiff testified that the ponding had increased of late. *Stack v. Railroad*, 366.

In an action on a note given by defendant's intestate, if the plaintiff had undertaken to testify in his own behalf that he had or had not made a demand for payment of the note of the intestate such evidence should on objection have been excluded as incompetent under section 590, and it was not proper for defendant's counsel to comment on the failure of the plaintiff to testify on this question of demand. *Davis v. Evans*, 440.

Where the plaintiff agreed to remain with her father and work for him during his life time, and in consideration thereof he agreed to devise her one-fourth of his estate, evidence that fifteen months before his death, the plaintiff married and removed to another State, is an abandonment of the contract, and she could only recover on the contract by showing some legal excuse for non-performance, and her testimony that she did not go back after she got married, they did not want her to go back, would not justify a finding that she was prevented by her father from performing the contract. *Tussey v. Owen*, 457.

EVIDENCE—*Continued.*

It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff. *Kearns v. Railroad,* 470.

In an action for damages for an injury from a collision, evidence which merely shows that it was possible that the failure to stop the train caused the injury, or merely raises a conjecture that it was so, is legally insufficient and should not be submitted to the jury. *Kearns v. Railroad,* 470.

Evidence that the plaintiff, driving his horse and buggy, crossed the defendant's track and after he had gotten across and when distant from 15 to 40 feet and about the time the engine passed the crossing, the horse began to back and continued backing and backed into the cars; that the engineman was looking out at the plaintiff and slackened the speed of the train, which was going very slowly and after plaintiff's buggy struck it stopped very quickly, in 15 feet of the crossing according to one witness, and within two or three car lengths, according to the plaintiff, *held,* that the plaintiff failed to make out a case of actionable negligence. *Kearns v. Railroad,* 470.

Evidence should raise more than a mere conjecture as to the existence of the fact to be proved. *Campbell v. Everhart,* 503.

The recital in the deed of plaintiffs' grantor that H (the character of whose possession was at issue) paid her the consideration is not competent against the defendants, nothing else appearing. *Campbell v. Everhart,* 503.

Testimony of a witness interested in the event of the action, as to transactions or communications between him and a deceased person from whom the defendants derive title, is not competent against them, the extent of the interest not being material. *Campbell v. Everhart,* 503.

In an action to establish a lost deed, evidence offered by the defendants of a statement by a person that he owned no interest in the property, was properly rejected, where the plaintiffs did not claim under such person, and he was not a party to the action. *Jones v. Ballou,* 526.

In an action to recover balance of house rent where the plaintiff testified that he rented the house to the defendant through an agent and that the defendant paid the rent in person and through his employer, and that the defendant promised to pay the balance due and the employer testified that he charged the money to the defendant's account; and that the defendant testified that he paid the rent for his mother and that he never

EVIDENCE—*Continued.*

rented the house, and the agent testified that he did not rent the house to the defendant, *held*, that the plaintiff is entitled to have the case submitted to the jury on the question whether the defendant is not answerable as the original or present debtor. *Sheppard v. Newton*, 533.

Where, without any provocation in law or in fact, the prisoner who is carrying a concealed and loaded weapon on an excursion train, takes it from his left pocket, transfers it behind his back to his right hand, raises it and points it at the deceased, warning him to look out, and then fires the fatal shot, and leaves the car singing a flippant song, *held*, that this is sufficient evidence of premeditation and deliberation. *State v. Daniel*, 549.

EXCEPTIONS AND OBJECTIONS. See "Appeal and Error;" "Harmless Error."

An exception to the admission of evidence which, if irrelevant, was harmless, is without merit. *Board of Education v. Makely*, 31.

The approval by the judge of the clerk's findings of fact is conclusive, unless the exception, for that there is no evidence to sustain them, can be sustained. *Carraway v. Lassiter*, 145.

Section 550 of The Code and Rule 27 of this court requires an assignment of the errors relied on to be tabulated and inserted in the case on appeal or record, preferably at the end. *Hicks v. Kenan*, 337.

Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 337.

An exception to the refusal of the court to set aside the verdict, because several of the jurors signed a paper to the effect that they did not fully understand the issues and the legal effect of their findings, is without merit, as jurors cannot be heard to impeach their verdict. *Coxe v. Singleton*, 361.

Where counsel for the defendant, in his closing speech to the jury, commented on a fact not relevant to the issue and argued an erroneous proposition of law and this was immediately brought to the attention of the court, both by objection and by a prayer for instruction presented at the time, the failure of the court to advert to the matter either at the time or in the charge was error, which entitles the plaintiff to a new trial. *Davis v. Evans*, 440.

The fact that no objection was made at the time and the court below was not asked to interfere and correct the effect of the de-

EXCEPTIONS AND OBJECTIONS—*Continued.*

nunciation of the solicitor in his argument to the jury precludes this court from considering it. *State v. Archbell*, 537.

If an appeal from a refusal to grant an application for a bill of particulars was permissible, it was premature. The defendant should have noted his exception, and if the final judgment was against him, he could have had the refusal reviewed on appeal therefrom. *State v. Dewey*, 556.

The above entry "defendant excepted" applies only to giving the charge and special instructions, and besides, is void as "broadside." *State v. Dewey*, 556.

Unless an exception to language used by counsel is taken, either at the time the language is used, or by request to the court to instruct the jury that they must disregard the objectionable language, it cannot be assigned as error. *State v. Horner*, 603.

EXCUSABLE HOMICIDE. See "Homicide."

Where the defendant, while hunting on lands without written permission of the owner, as required by statute, killed the deceased unintentionally, and the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life and negatived all idea of negligence, *held*, that the case is one of excusable homicide, as the offense was *malum prohibitum*. *State v. Horton*, 588.

When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense. *State v. Horner*, 603.

EXECUTORS AND ADMINISTRATORS. See "Guardian and Wards."

In an action to recover for services rendered the defendant's intestate, the testimony of plaintiff that she "gave him medicine, prepared his nourishment, kept him clean and cared for him generally, he was helpless altogether; we had to do all the services and wait on him," was incompetent under section 590 of The Code, this being a "personal transaction" with deceased. *Davidson v. Bardin*, 1.

Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, *held*, such testimony does not fall within the inhibition of section 590 of The Code, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. *Bonner v. Stotesbury*, 3.

EXECUTORS AND ADMINISTRATORS—*Continued.*

In an action for services rendered the testator of defendant, when the plaintiff testifies as to the value of services "rendered," though he does not state in so many words that he had rendered them to testator, he necessarily speaks, though perhaps indirectly, of a transaction or communication with the deceased, and the testimony is incompetent under section 590 of The Code, which is intended to exclude even the indirect testimony of an interested witness as to a transaction or communication with the deceased as the latter cannot be heard in reply. *Stacks v. Cannon*, 60.

A person indebted cannot by devising his lands, upon contingent limitations to parties not *in esse*, prevent their sale for payment of his debts until all who may by possibility take are born or every possible contingency is at an end. *Carraway v. Lassiter*, 145.

In a special proceeding by an executor to sell the lands of his testatrix to make assets to pay her debts a devisee (without children), to whom the entire estate was given for life, remainder to such children as she might leave surviving, and in default of issue to an asylum, represented the entire title for the purpose of enabling the court to proceed in the cause, and children thereafter born to her are bound by the judgment. *Carraway v. Lassiter*, 145.

In a special proceeding by an executor to sell lands, the clerk has power to appoint a guardian *ad litem* for an infant defendant, where the executor was the general guardian of such infant. *Carraway v. Lassiter*, 145.

Where a petition for license to sell land was filed on October 12th, and the clerk, on the 15th day of the same month and before any summons was issued, made an order appointing a guardian *ad litem*, this was irregular, but the service of process upon the infant defendant and the guardian *ad litem*, followed by the filing of an answer by him, cured the irregularity in the order of appointment. *Carraway v. Lassiter*, 145.

In the absence of an order to suspend further proceedings upon the filing of a *caveat*, as provided by section 2160 of The Code, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. *Carraway v. Lassiter*, 145.

The fact that litigation was pending in regard to the title to a portion of the land sold, and that by reason thereof and the pendency of a caveat, persons were restrained from bidding for the land, would not constitute ground for setting the judgment,

EXECUTORS AND ADMINISTRATORS—*Continued.*

etc., aside; such matters could only be considered in a separate action to attack the proceeding and sale for fraud. *Carraway v. Lassiter*, 145.

The presumption of payment from the lapse of time arises only between the executor and legatee, between debtor and creditor, it being a protection to discharge a liability and it cannot arise to create a liability to a third person on the part of the person who should have received the legacy. *Outlaw v. Garner*, 190.

Where the plaintiff brings an action, under section 1498 of The Code, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action nor for the loss of the services of his child. *Byrd v. Express Co.*, 273.

A personal representative has the right to employ an attorney whenever it is necessary to protect the estate or to enable him to manage it properly, and on the settlement of his accounts he will be allowed credit, as part of the expenses of administration, for the reasonable charges paid by him for such services. *Kelly v. Odum*, 278.

Such an allowance is always based upon the prudence and good faith of the trustee, and credit will not be given if litigation has been improperly instituted by him or was the result or consequence of his neglect, or improper conduct, benefit to the estate being generally necessary to charge the estate with an expenditure of this character. *Kelly v. Odum*, 278.

Where an administrator c. t. a. made no defense to a suit brought by his father, but permitted judgment to be taken by default, and then brought a proceeding to charge the land of his testator with the payment of the judgment thus obtained, and two juries decided that there was nothing due to his father, *held*, that it was error to tax against the defendant, who was a purchaser from the devisees, as a part of the costs, an allowance for attorney's fee paid by the administrator for bringing and prosecuting the latter proceeding. *Kelly v. Odum*, 278.

An executor is always personally liable to his counsel for his fee, but it is in no sense a debt of the estate. *Kelly v. Odum*, 278.

In a proceeding by an administrator to sell land for assets, the clerk made on order of sale in February, 1897, and upon the clerk's minutes appears an entry of appeal by defendants (heirs at law). The land was sold in April, and sale confirmed in May, 1897, and the cause appears for the first time on civil issue docket at January Term, 1899, *held*, that a judgment declaring the sale void, pending the appeal, and directing a re-sale, was error, as the appeal was abandoned. *Love v. Love*, 363.

EXECUTORS AND ADMINISTRATORS—*Continued.*

An arrangement between distributees and legatees to permit their property with the consent and co-operation of the personal representatives of deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership. *Walker v. Miller*, 448.

The death of a partner, in the absence of any stipulation in the articles of co-partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. *Walker v. Miller*, 448.

EXECUTORY DEVISES. See "Wills."

EXPENDITURES. See "Damages."

EXPRESSION OF OPINION BY JUDGE.

It was error to instruct the jury that the deed was sufficient of itself to vest the title in the grantees therein, where plaintiffs' right to recover was dependent upon evidence that the defendants' grantor was estopped to claim the land, as the credibility of the witnesses was a matter for the jury to pass upon, and the court in deciding this question, invaded their province, contrary to the provision of section 413 of The Code. *Campbell v. Everhart*, 503.

FALSE IMPRISONMENT.

A finding that the defendant, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect its poles on his land, makes the defendant liable therefor. *Jackson v. Telegraph Co.*, 347.

Where the jury found that the defendant's agent arrested the plaintiff not because the plaintiff had assaulted him, but to put him out of the way, and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages were allowable. *Jackson v. Telegraph Co.*, 347.

FALSE WARRANTY. See "Deceit."

FELLOW SERVANT ACT.

One effect of the Fellow Servant Act (chap. 57, Private Laws 1897,) is to abolish, so far as railroads are concerned, the doctrine known as the Fellow Servant Doctrine, and make the company responsible for the negligent acts of its employees in the course

FELLOW SERVANT ACT—*Continued.*

of their service or employment, when by reason of such negligence a fellow servant or other employee is injured. *Mabry v. Railroad*, 388.

In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant, by reason of the Fellow Servant Act. *Biles v. Railroad*, 528.

FINES. See "Penalties."

Fines, from their very nature, being punishment for violation of the criminal law, are imposed in favor of the State and belonging to the State, the Legislature cannot appropriate their clear proceeds to any other purpose than the school fund. *State v. Maultsby*, 583.

By "clear proceeds" is meant the total sum less only the sheriff's fees for collection, when the fine and costs were not collected in full. *State v. Maultsby*, 583.

The provision in chapter 125, Laws 1903, that the informant "shall receive one-half of the fine imposed" is unconstitutional and there was no error in refusing the petition of the informant for one-half of a fine imposed for selling liquor contrary to its provisions. *State v. Maultsby*, 583.

FIRE INSURANCE. See "Insurance."

FIRES. See "Negligence."

FISH AND FISHERIES.

Chapter 292 of the Acts of 1905, making it unlawful to set or fish any nets in certain sections of Albemarle and Pamlico Sounds, from January 15 to May 15 in each year, and providing that any person who shall violate said act shall be guilty of a misdemeanor, and further providing that the Oyster Commissioner shall seize all nets setting or being used in violation of said act, sell the same at public auction and apply the proceeds to the payment of cost of removal and pay any balance to the school fund, is a constitutional exercise of the police power. *Daniels v. Homer*, 219.

There is no individual or property right of fishery in the waters of Albemarle and Pamlico Sounds, but such right rests in the State, and is subject absolutely to such regulations as the General Assembly may prescribe and can be exercised only at such times and by such methods as it may see fit to permit. *Daniels v. Homer*, 219.

FISH AND FISHERIES—*Continued.*

Fishing in waters when prohibited by law is a public nuisance and the General Assembly has the power to authorize a prompt abatement of the nuisance by seizure and sale of the nets subject to the right of their owner to contest the fact of his violation of the law by a proceeding of claim and delivery, or by injunction to prevent sale, or by action to recover the proceeds of sale and damages. *Daniels v. Homer,* 219.

Under chapter 824, Laws 1905, which provides that "it shall be unlawful for any person to hedge or fish with traps in the waters of Bear Creek between the mouth of said creek where it empties into Neuse river and the Joyner mill-seat," the defendant is prohibited from setting hedges in ditches 15 or 20 yards below the mill house, though he owns the mill house and the land for 75 yards below the mill, as "mill-seat" designates a well defined landmark—the dam and mill—and not the extent of the mill owner's territorial possession in the vicinity. *State v. Sutton,* 574.

Under this statute, the defendant is not prohibited from setting hedges on the sheeting of the mill, under the roof of his mill house and catching fish coming out of the pond, but he cannot interfere by such hedges with those which come up from the mouth of Bear Creek till stopped at the dam and mill-seat. *State v. Sutton,* 574.

The right of the General Assembly to regulate fisheries, even on private property, is settled. *State v. Sutton,* 574.

FORECLOSURE OF MORTGAGE. See "Mortgagor and Mortgagee."

FOREIGN CORPORATIONS. See "Corporations."

FORMER CONVICTION.

The justice having no jurisdiction to try and convict the defendant after he had bound him to court, a plea of former conviction in the Superior Court was properly overruled, where the indictment alleged that there was serious damage, though the jury convicted of a simple assault merely. *State v. Lucas,* 567.

FRAUD. See "Evidence."

Upon the question of fraudulent concealment of funds, section 155 (9) of The Code, applies only where the ground of the action for relief is fraud or mistake and the statute runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hitherto unknown to him. *Bonner v. Stotesbury,* 3.

FRAUD—*Continued.*

Where the defendant obtained possession of a mule in a trade with the plaintiff by false, fraudulent and deceitful representations, the plaintiff may sue for damages for the false warranty, or repudiate the trade and sue to recover the specific property. *Joyner v. Early*, 49.

In an action by plaintiff, who was an illiterate man, to set aside a deed because it was obtained by fraud and without consideration, evidence that the defendant, an educated man and a physician, went to the plaintiff's premises, and representing that he had bought in an old mortgage debt, which plaintiff claimed had been paid, procured from the plaintiff, without any payment to him, the execution of a deed which was written by the defendant and was different from what was represented, and the existence of the mortgage debt was not shown, *held*, the case was properly submitted to the jury. *Hodge v. Hudson*, 358.

Where a defendant has made a promise to answer the debt of another and seeks protection under the provisions of section 1552 of The Code, it must be shown that the debt is that of a third person, and that such person continues liable for the same. If the debt claimed is an original obligation of the defendant, or if the creditor, in accepting the obligation or promise of the defendant and in consideration thereof, has released a third person who was the original debtor, the statute has no application. *Sheppard v. Newton*, 533.

The charge of the court on the question of fraudulent intent is correct within the ruling in *State v. McDonald*, 133 N. C., 690, which was more lenient to the defendant than it would have been had the bill been drawn as authorized by the amendment (Laws 1889, chapter 226,) to section 1014. *State v. Dewey*, 556.

FREE TRADER. See "Abandonment."

While a safe test of the power of the wife to contract in regard to her separate property as a free trader, when abandoned by her husband, is her right to maintain an action for divorce for like cause; yet she is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. *Vandiford v. Humphrey*, 65.

FREIGHT. See "Carriers."

GRANTS. See "Deeds;" "Ejectment."

GUARANTY.

Where the defendant, in reply to plaintiff's letter of inquiry about W, stated that "we regard W as a reliable and trustworthy gentleman with whom your samples and sales would be entirely safe, and doubly so as all tobacco of yours that might be shipped would come direct to our warehouse, and payment for all such tobacco would be made by us to you for all sales," *held*, the defendant's demurrer on the ground that the letter did not constitute a guaranty was properly sustained. ***Hughes** v. Warehouse Co.*, 158.

GUARDIAN *AD LITEM*. See "Guardian and Ward."

GUARDIAN AND WARD.

The Superior Court has, independently of The Code, the power to appoint a guardian *ad litem* for an infant defendant, and it may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person, and the clerk who acts as and for the court may do the same in special proceedings pending before him. *Carraway v. Lassiter*, 145.

In a special proceeding by an executor to sell lands, the clerk has power to appoint a guardian *ad litem* for an infant defendant, where the executor was the general guardian of such infant. *Carraway v. Lassiter*, 145.

Where a petition for license to sell land was filed on October 12th, and the clerk, on the 15th day of the same month and before any summons was issued, made an order appointing a guardian *ad litem*, this was irregular, but the service of process upon the infant defendant and the guardian *ad litem*, followed by the filing of an answer by him, cured the irregularity in the order of appointment. *Carraway v. Lassiter*, 145.

The failure to appoint a guardian *ad litem* of a minor husband does not affect the validity of a decree of sale of land, where such husband had no interest in the land, his wife having but a life estate. *Carraway v. Lassiter*, 145.

HABEAS CORPUS.

The writ of *habeas corpus* can never be made to perform the office of a writ of error or appeal. The investigation is confined to the question of jurisdiction or power of the judge to proceed as he did, and the merits of the controversy are not passed upon. *Ex Parte McCown*, 95.

In *habeas corpus* proceedings, this court is bound by the judge's findings of fact which were spread upon the record as required by the statute. *Ex Parte McCown*, 95.

HABEAS CORPUS—Continued.

In direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus*, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right to answer and to be heard in defense, and also with the right of appeal. *Ex Parte McCown*, 95.

HARMLESS ERROR.

An exception to the admission of evidence which, if irrelevant, was harmless, is without merit. *Board of Education v. Makely*, 31.

The expression of the trial judge in charging the jury, "If you believe from the evidence * * * " is inexact and should be eschewed, yet the use of such language is not reversible error unless it clearly appears that the appellant was probably prejudiced thereby. *Merrell v. Dudley*, 57.

In an action by the husband for mental anguish the admission of evidence of the privation and suffering of the wife and children would be reversible error but for the fact that in the charge the court withdrew it from the consideration of the jury. *Dayvis v. Telegraph Co.*, 79.

It is not reversible error for the court to refuse to give an instruction in response to a prayer, where it appears that it was afterwards given by the court in its charge. *Yarborough v. Hughes*, 199.

The court does not approve of issues which embody evidentiary facts instead of the ultimate facts to be found by the jury, but where no harm has come to the appellant by reason of this defect, it is not reversible error. *Jackson v. Telegraph Co.*, 347.

Where a mistake of the court is not on any essential or controlling feature of the case, it does not constitute reversible error. *Eubanks v. Alspaugh*, 520.

The use of the word "plausible" was not excepted to and if it had been, the inadvertence, if any, was cured by the full, correct and explicit charge which was thereafter repeated. *State v. Dewey*, 556.

HEARSAY EVIDENCE. See "Evidence."

HEIRS. See "Deeds."

HIGHWAYS. See "County Commissioners;" "Roads."

HOMICIDE. See 'Excusable Homicide."

Where it was material for the State to show that the prisoner fired the fatal shot, and several witnesses were introduced who swore positively that when the fourth shot was fired the weapon was in the hands of the prisoner, while other witnesses testified that they did not see the pistol, and did not know in whose hands it was when the fourth shot was fired, an instruction that it was the jury's duty to give to positive testimony greater weight than they give to negative testimony, and that the testimony of the former witnesses was what the law terms positive, and that the testimony of the latter was negative, was proper, where the judge followed it up by adding an instruction that left the credibility of the witnesses to the jury. *State v. Murray*, 540.

Where the design to kill is formed with premeditation and deliberation, it is not necessary for it to exist any definite length of time before the killing actually takes place. *State v. Daniel*, 549.

Where a prisoner who has killed a person displays thought, contrivance and design in the manner of securing and handling his weapon, such exercise of contrivance and design denotes deliberation—the exercise of judgment and reason rather than violent and ungovernable passion. *State v. Daniel*, 549.

The existence of premeditation and deliberation is a fact to be found by the jury when there is any evidence to warrant the finding. *State v. Daniel*, 549.

Where, without any provocation in law or in fact, the prisoner who is carrying a concealed and loaded weapon on an excursion train, takes it from his left pocket, transfers it behind his back to his right hand, raises it and points it at the deceased, warning him to "look out" and then fires the fatal shot, and leaves the car singing a flippant song, *held*, that this is sufficient evidence of premeditation and deliberation. *State v. Daniel*, 549.

If the prisoner slew on a principle of revenge for a fancied wrong, which was very trivial in its nature, having made up his mind fully to kill to avenge it, he is guilty of the capital felony. *State v. Daniel*, 549.

Where the defendant, while hunting on lands without written permission of the owner, as required by statute, killed the deceased unintentionally, and the special verdict having found that the act in which the defendant was engaged was not in itself dangerous to human life and negatived all idea of negligence, *held*, that the case is one of excusable homicide as the offense was *malum prohibitum*. *State v. Horton*, 588.

HOMICIDE—*Continued.*

Where the prisoner knew that the deceased was a deputy sheriff, and that he had a warrant for his arrest for a misdemeanor it was his duty to submit to arrest and in resisting it, with a gun in his hand, it is not open to him to say that he acted in self-defense and this is not affected by the fact that the officer was not justified in shooting him to make the arrest. *State v. Horner*, 603.

HUSBAND AND WIFE. See "Abandonment;" "Divorce."

While a safe test of the power of the wife to contract in regard to her separate property as a free trader, when abandoned by her husband, is her right to maintain an action for divorce for like cause; yet she is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. *Vandiford v. Humphrey*, 65.

The failure to appoint a guardian *ad litem* of a minor husband does not affect the validity of a decree of sale of land, where such husband had no interest in the land, his wife having but a life estate. *Carraway v. Lassiter*, 146.

Where a conveyance is made to the husband and wife and three children, the husband and wife together are seized of one-fourth by entireties, and the children of one-fourth each, and upon the death of the wife, the husband acquires the one-fourth by right of survivorship. (Dictum in *Hampton v. Wheeler*, 99 N. C., 222, corrected). *Dardin v. Timberlake*, 181.

IMPEACHMENT OF VERDICT. See "Verdict, Impeachment of."

IMPLIED WARRANTY. See "Warranty."

INDICTMENT. See "Eavesdropping."

The justice having no jurisdiction to try and convict the defendant after he had bound him to court, a plea of former conviction in the Superior Court was properly overruled, where the indictment alleged that there was serious damage though the jury convicted of a simple assault merely. *State v. Lucas*, 567.

INDULGENCE. See "Consideration."

INFANTS. See "Guardian and Ward;" "Unborn Children."

INFORMANTS.

The provision in chapter 125, Laws 1903, that the informant "shall receive one-half of the fine imposed" is unconstitutional and

INFORMANTS—*Continued.*

there was no error in refusing the petition of the informant for one-half of a fine imposed for selling liquor contrary to its provisions. *State v. Maultsby*, 583.

INJUNCTIONS.

While the owner of the inheritance, either by way of reversion or vested remainder, can maintain an action for waste, yet one entitled to a contingent remainder cannot maintain such an action, but the interest of a contingent remainderman in the timber will be protected by a Court of Equity by injunction. *Latham v. Lumber Co.*, 9.

The Act of 1901, chapter 666, is not a limitation upon the power of the courts to continue injunctions until the controversy can be decided by court and jury, but was intended to preserve the timber upon lands in litigation pending the suit and throws greater safeguards around the rights of litigants, and when the plaintiff satisfies the judge that his claim is *bona fide* and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be fully determined. *Moore v. Fowle*, 51.

On hearings for injunctions the title is not required to be proved with that strictness and certainty of proof as upon the trial. *Moore v. Fowle*, 51.

The fact that proceedings had been instituted before a Highway Commission to acquire a right of way for a tramway or railway, and were pending in the Superior Court, does not prevent the court interfering by injunction with the construction of the proposed railway, where the result of that proceeding could not affect the plaintiff's right to enjoin the defendants. *Cozard v. Hardwood Co.*, 283.

A citizen is not entitled to an injunction restraining a board of commissioners from proceeding to erect a bridge across a river at a certain point, though there is no public highway leading to such point, where the court finds that the board has in contemplation the opening of a public road to such point, and that arrangements have been made for that purpose. *Glenn v. Commissioners*, 412.

INSTRUCTIONS.

In an action of ejectment, an instruction that if the jury should find that plaintiff and those under whom he claimed had been in the exclusive, open, continuous and adverse possession of the land in controversy from 1880 to the bringing of the action, they should answer the issue for the plaintiff, is erro-

INSTRUCTIONS—*Continued.*

neous, where the plaintiff failed to show any privity in respect to the *locus in quo* between himself and those whose possession preceded his. *Jennings v. White*, 23.

In an action brought by plaintiffs for the purpose of having vacated and cancelled a grant issued to the defendant upon the ground that the land was not the subject of entry and grant as it was swamp land and was vested in the plaintiffs under section 2506 of The Code, an instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is swamp land before they could find for the plaintiffs, was proper, though the plaintiffs were in possession of the land when the suit was commenced. *Board of Education v. Makely*, 31.

Where a party requests the court to charge the jury that if they believe the evidence they should answer the issue in his favor, the adverse party is entitled to have the evidence considered most strongly in his favor and all facts which it reasonably tends to prove for him must be considered established, and any part of the evidence which tends to disprove the contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit, and where the evidence on the issue was not all one way, the instruction was not a proper one. *Board of Education v. Makely*, 31.

The expression of the trial judge in charging the jury, "If you believe from the evidence * * * " is inexact and should be eschewed, yet the use of such language is not reversible error unless it clearly appears that the appellant was probably prejudiced thereby. *Merrell v. Dudley*, 57.

In an action for malicious prosecution, a charge that malice may be inferred by the jury from a want of probable cause and "other circumstances" does not mean that both a want of probable cause as well as corroborating circumstances are required to prove malice. *Merrell v. Dudley*, 57.

An instruction on the issue of abandonment under section 1832 of The Code, that if the husband "at the time of the execution of the deed in question by his wife, did voluntarily leave his wife, desert her, prior to the time of the execution of the deed, with the intention of forsaking her entirely and never to return," the jury should answer the issue "yes," was correct. *Vandiford v. Humphrey*, 65.

It is not reversible error for the court to refuse to give an instruction in response to a prayer, where it appears that it was afterwards given by the court in its charge. *Yarborough v. Hughes*, 199.

INSTRUCTIONS—*Continued.*

Where two instructions are conflicting, they must necessarily have confused the jury, and as it is impossible to tell upon which one the jury acted, the appellant has just reason to complain. *Pegram v. Railroad,* 303.

An instruction that imposed only one limitation upon the right of an employee to recover his employer's property endangered by fire, viz.: he must not act "recklessly," is erroneous. *Pegram v. Railroad,* 303.

In an action for damages for death by wrongful act, an instruction that "whenever an adult has been killed and his administrator brings suit * * * it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures and unless he has done that, it is the duty of the jury to say that he is not entitled to recover anything," is erroneous. *Carter v. Railroad,* 499.

The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. *Carter v. Railroad,* 499.

Where, before reading the written charge to the jury, the court stated orally that this was an important matter to the defendant and the State, and in arriving at a verdict they must not be governed or swayed by sympathy, prejudice or passion, but render such a verdict as is warranted by the evidence, there is nothing prejudicial to the defendant in this, nor is it a violation of section 414 of The Code, which requires a judge, when requested in apt time, to put his instructions in writing. *State v. Dewey,* 556.

The word "instructions" as used in section 414 of The Code, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issues. *State v. Dewey,* 556.

After the jury had been out some time, they returned into court and said that they could not agree. The court "stated it was the duty of a jury to reconcile the testimony, where there was a conflict, and if they could not reconcile the testimony, then it became their duty to adopt the most plausible theory of the evidence in arriving at a verdict." The jury then retired, and counsel for defendant called the attention of the court to what

INSTRUCTIONS—*Continued.*

the defendant claimed was an error in leaving out the question of reasonable doubt and fraudulent intent. The court immediately called the jury back and re-stated to them what he had just told them and further stated that the State must satisfy them beyond a reasonable doubt of the fraudulent intent, etc., and read, the second time, his charge and defendant's instructions. Defendant excepted. *Held,* the above remarks, if oral, were not "instructions" upon the law applicable to the facts of this case. *State v. Dewey,* 556.

In an indictment under chapter 434, Laws 1903, for selling "drinks containing alcohol," an instruction that the drink "must contain some appreciable amount of alcohol—such an amount as a man of ordinary sense, reason and judgment would say that it had alcohol in it," was not prejudicial to the defendant. *State v. Parker,* 586.

INSURANCE. See "Corporations."

A by-law of the defendant company which provided that any member failing to pay his assessment within sixty days from date of notice (which date shall be the day of mailing said notice), shall forfeit all rights in the company, is subject to rebuttal on the part of the plaintiff by showing non-receipt of notice, the defendant having properly postpaid and addressed the same. *Sherrod v. Insurance Asso.,* 167.

All contracts and by-laws of an incorporated society are made with reference to the general law, and they must conform to certain general requirements in respect to vested personal and property rights of members. *Sherrod v. Insurance Asso.,* 167

The statute, which authorizes service of summons against non-resident insurance companies upon the Commissioner of Insurance, does not abrogate or affect the suspension of the running of the statute in such cases. *Green v. Insurance Co.,* 309.

In an action for the wrongful cancellation of an assessment policy, where the plaintiff, becoming alarmed at the defendant's ceasing to write assessment policies and the increasing annual assessments, ceased to pay, and the defendant cancelled his policy, a judgment of nonsuit was proper where the plaintiff failed to show that his assessments were increased by reason of the defendant's ceasing to write assessment insurance, or that he was discriminated against, and there was nothing in the charter or policy requiring the defendant to continue writing assessment insurance. *Green v. Insurance Co.,* 309.

Where the plaintiff voluntarily ceased payment and abandoned his policy, he cannot ask damages for its cancellation. *Green v. Insurance Co.,* 309.

INSURANCE—*Continued.*

In an action for the wrongful cancellation of a policy, the motive or the method of reasoning by which the plaintiff arrived at the conclusion to abandon his policy, was irrelevant. *Green v. Insurance Co.*, 309.

In an action for the wrongful cancellation of a policy, a question whether the plaintiff subsequently took out other insurance in lieu of that which he had abandoned, was properly excluded. *Green v. Insurance Co.*, 309.

The courts seek to sustain and enforce contracts of mutual insurance companies, by looking to the substance and intention, rather than by adopting a technical or strained construction. *Perry v. Insurance Co.*, 374.

Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. *Perry v. Insurance Co.*, 374.

The right of each policy holder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policy holder. *Perry v. Insurance Co.*, 374.

The plaintiff cannot hold the officers of the defendant association personally liable for his judgment against it, because they procured its dissolution and the formation of a new company. *Perry v. Insurance Co.*, 375.

The plaintiff may, by motion in the cause in which he obtained judgment, have an order directed to the defendant corporation to have the assessment made according to its charter and by-laws, and the court has power to enforce its performance by appropriate orders. *Perry v. Insurance Asso.*, 375.

The provisions in the "Iron Safe Clause" of an insurance policy (1) That the assured shall make an inventory "within 30 days after the date of the policy" and (2) that he shall keep a set of books "from the date of the inventory as provided in the first section," are not violated where the fire occurred within 23 days and before any inventory was taken or set of books kept, as the assured has the full period of 30 days after the date of the policy to make the inventory and a like period within which to comply with the provision as to keeping a set of books, unless the inventory is sooner taken. *Bray v. Insurance Co.*, 390.

Where a clause in an insurance policy is ambiguously worded or there is doubt concerning its true meaning, it should be construed rather against its author than the assured, and any

INSURANCE—*Continued.*

such doubt should be resolved in favor of the latter. *Bray v. Insurance Co.*, 390.

Where a cause of action is not against the defendant as a common carrier, but for that while the cotton was in a compress building belonging to J awaiting compression and shipment, it was burned by the negligence of the defendant, a contract, between plaintiff and insurance brokers, to which the insurance companies were not parties, to make an advance "pending collection from the carrier or other bailee" has no application. *Cunningham v. Railroad*, 427.

The receipt executed by the plaintiffs for "amount of 500 bales of cotton burnt at compress" and their letter acknowledging receipt of cheque "in settlement of our claim for total loss of 500 bales of cotton" and expressing their appreciation of the "promptitude with which the underwriters settled the claim," and their hope that the "underwriters will be recouped a substantial portion of their loss" negative any suggestion of a loan or advancement. *Cunningham v. Railroad*, 427.

When the insurer against fire has paid the loss sustained, it is subrogated to the rights of the insured and can alone, under section 177 of The Code, as the real party in interest, maintain an action against the wrongdoer, and this right to be subrogated is independent of section 44, chapter 54, Laws 1899, and it is immaterial whether the insured makes an actual assignment or not. *Cunningham v. Railroad*, 427.

If, after knowledge of the payment of the loss by the insurer, the wrongdoer pays the damages sustained by the destruction of the property, such payment will not bar the action of the insurer to recover upon his subrogated right. *Cunningham v. Railroad*, 427.

INSURERS. See "Carriers."

INTOXICATING LIQUORS.

Chapter 434, Laws of 1903, making it unlawful to sell any drink *containing alcohol*, is not repealed by chapter 497, Laws 1905, which prohibits the sale of spirituous, vinous or malt liquors or other *intoxicating drinks* and repeals all previous statutes in conflict. *State v. Parker*, 586.

In an indictment under chapter 434, Laws 1903, for selling "drinks containing alcohol," an instruction that the drink "must contain some appreciable amount of alcohol—such an amount as a man of ordinary sense, reason and judgment would say that it had alcohol in it," was not prejudicial to the defendant. *State v. Parker*, 586.

INTOXICATING LIQUORS—*Continued.*

Under the provisions of section 20, chap. 800, Laws 1905, providing that it shall be unlawful for any person to have in his possession more than two gallons of whiskey at any one time, and the possession of a greater quantity shall be *prima facie* evidence that such person is engaged in the illegal sale of liquor, the Legislature only intended to give the possession of more than two gallons of whiskey evidential force on the charge of illegal sale and did not intend to make the possession of such quantity of whiskey in itself a crime. *State v. McIntyre*, 599.

Quere: Whether it is in the power of the Legislature to make the mere ownership or possession of a given amount of whiskey in itself a crime. *State v. McIntyre*, 599.

An agreement to deliver one-half gallon of whiskey, entered into by the defendant in a city where the sale of liquor is prohibited, and receipt of the agreed price and delivery of the whiskey by the defendant within said city in pursuance of the agreement, constitute a sale of liquor upon the part of the defendant within the prohibited territory. *State v. Johnston*, 640.

IRON SAFE CLAUSE. See "Insurance."

ISSUES.

There is no error in refusing to submit issues tendered by the appellant if he has the full benefit of them in those which are submitted. *Jackson v. Telegraph Co.*, 348.

The court does not approve of issues which embody evidentiary facts instead of the ultimate facts to be found by the jury, but where no harm has come to the appellant by reason of this defect, it is not reversible error. *Jackson v. Telegraph Co.*, 348.

The issues arise upon the pleadings and not upon evidential facts, but where there are no written pleadings, it is the duty of the court to so frame the issues after hearing the evidence, as to develop the whole case and to present to the jury the real issues of fact in dispute. *Coxe v. Singleton*, 361.

The refusal to submit issues tendered is no ground for exception, where the issues submitted fairly present to the jury the controverted questions of fact. *Cunningham v. Railroad*, 427.

In an action to recover on a specific contract for services rendered by plaintiff to her father, the proper issue as to amount of recovery is "what sum, if any, is plaintiff entitled to recover." *Tussey v. Owen*, 457.

JUDGMENTS.

Where at the first trial of the case judgment was entered for the defendants and the plaintiff appealed and a new trial was granted, and at the second trial, the defendants again recovered and in the judgment, the plaintiff was taxed with all the costs of the defendants in the action, except the costs of appeal, *held*, the plaintiff's exception to the judgment upon the ground that he was not taxable with any of the costs of the first trial, was without merit; sections 525-6 and 540 of The Code, relating to taxation of costs, refer to a final recovery upon the merits. *Williams v. Hughes*, 17.

A consent judgment providing that the defendant has an equity to redeem the land upon the payment to the plaintiff of $600, on or before the first day of October next, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under section 152 (3) of The Code, ten years' possession of the defendant, after default, bars the plaintiff. *Bunn v. Braswell*, 135.

The fact that litigation was pending in regard to the title to a portion of the land sold, and that by reason thereof and the pendency of a *caveat*, persons were restrained from bidding for the land, would not constitute ground for setting the judgment, etc., aside; such matters could only be considered in a separate action to attack the proceeding and sale for fraud. *Carraway v. Lassiter*, 145.

In a proceeding by an administrator to sell land for assets, the clerk made an order of sale in February, 1897, and upon the clerk's minutes appears an entry of appeal by defendants (heirs at law). The land was sold in April, and sale confirmed in May, 1897, and the cause appears for the first time on civil issue docket at January Term, 1899, *held*, that a judgment declaring the sale void, pending the appeal, and directing a re-sale, was error, as the appeal was abandoned. *Love v. Love*, 363.

There is no law or practice which will permit a tender of judgment of one dollar as nominal damages as an aid to a defective demurrer. *Hall v. Telegraph Co.*, 369.

Where the record discloses that a case was conducted throughout as an adversary proceeding, and judgment was entered after

JUDGMENTS—*Continued.*

full and due inquiry into the facts, the decree is not a consent degree. *Bidwell v. Bidwell*, 402.

In an action for divorce, where neither party has a domicile in the State of the forum, such court having no jurisdiction of the subject matter of the controversy, a decree of divorce is void, though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court. *Bidwell v. Bidwell*, 402.

Where an action for divorce is instituted and the decree obtained in the State of the plaintiff's domicile, and the defendant has been served with process within the jurisdiction of the forum, or has voluntarily appeared and answered, a decree in such case is valid both *in rem* and *in personam* and will bind and conclude the parties everywhere. *Bidwell v. Bidwell*, 402.

JUDICIAL SALES. See "Purchasers for Value."

In the absence of fraud, a purchaser at a judicial sale, is only required to see that the court has jurisdiction of the person and the subject matter for his protection. *Carraway v. Lassiter*, 145.

Where a complaint alleges that the plaintiff, at a sale by a commissioner to make assets, purchased at a certain price per acre, a tract of land, the commissioner representing that said land contained 416 acres, and bids being asked for at so much per acre, and paid for 416 acres, and subsequently ascertained that the tract contained only 320 acres, *held*, that a cause of action is set up, in seeking to correct an overpayment by reason of an error in calculating the amount due, when there is no *laches* shown as to the purchaser and no change of condition by reason of which correction would work a prejudice to those for whose interest the land was sold. *Peacock v. Barnes*, 196.

There is no implied warranty in the sale of real estate when made otherwise than by judicial decree, either as to quantity, title, or encumbrance, and the cases in which the courts have relieved the purchaser at a judicial sale by reason of a defect of title or shortage, have been usually instances in which such matters have been called to the attention of the court prior to confirmation and payment, and while the sale was under the control of the court. *Peacock v. Barnes*, 196.

JURISDICTION.

In an action for rent begun before a justice of the peace where the defendant denied plaintiff's title and lease, the justice properly dismissed the action *Hudson v. Hodge*, 308.

JURISDICTION—*Continued.*

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The owner of an equitable title may sue in a justice's court for the recovery of crops. *Walker v. Miller*, 448.

In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action should have been brought before the clerk under section 56 of The Code, was properly refused, as that section is an enabling act giving an additional, but not exclusive remedy. *Jones v. Ballou*, 526.

Where a justice of the peace heard a warrant charging the defendant with an assault, with serious damage, and adjudged that the accused give bond for his appearance and his bond was executed and accepted by the justice, the latter's power and jurisdiction ceased and his attempt to reverse his decision the next day and fine the defendant was a nullity. *State v. Lucas*, 567.

JURORS. See "Verdict, Impeachment of;" "Eminent Domain."

JUSTICES OF THE PEACE.

The failure of a justice of the peace to sign the return to notice of appeal does not vitiate the proceedings in the Superior Court, where the appellant nad given notice of appeal and paid the justice's fee, and the appellee made no motion for any purpose, but made a general appearance in the Superior Court at the trial in person and by attorney. *Hawks v. Hall*, 176.

If the justice fails to discharge his duty to make his "return of appeal," he may be compelled to do so by attachment, and if the return be defective, the judge may direct a further or amended return. *Hawks v. Hall*, 176.

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JUSTICES OF THE PEACE—*Continued.*

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There is no authority given to a justice of the peace to grant a new trial in a criminal case after he has made a final disposition of it. *State v. Lucas*, 567.

The justice having no jurisdiction to try and convict the defendant after he had bound him to court, a plea of former conviction in the Superior Court was properly overruled, where the indictment alleged that there was serious damage, though the jury convicted of a simple assault merely. *State v. Lucas*, 567.

LATENT AMBIGUITY.

A deed made to "Jas. Webb. Jr., & Bro.," a partnership name and style adopted by the distributees and legatees of the deceased partners, is valid, though the partners are not named in the deed, it being a latent ambiguity which may be explained by parol. *Walker v. Miller*, 448.

LEGACIES. See "Wills."

LEGISLATURE. See "Constitutional Law;" "Acts;" "Code, The."

The power to attach for a certain class of contempts being inherent in the courts and essential to their existence and the due performance of their functions, the Legislature cannot, as to them, deprive the courts of this power or unduly interfere with its exercise. *Ex Parte McCown*, 95.

The Legislature has the power to supervise, regulate and control the rates and conduct of common carriers, and this regulation may be exercised either directly or through a commission. *Corporation Commission v. Railroad*, 126.

There is no individual or property right of fishery in the waters of Albemarle and Pamlico Sounds, but such right rests in the State, and is subject absolutely to such regulations as the General Assembly may prescribe and can be exercised only at such times and by such methods as it may see fit to permit. *Daniels v. Homer*, 219.

LEGISLATURE—*Continued.*

The right of the General Assembly to regulate fisheries, even on private property, is settled. *State v. Sutton*, 574.

The Legislature has power to give "penalties," which must be sued for, either wholly or in part to whomsoever shall sue for the same, and only the clear proceeds of such as accrue to the State go to the school fund under the provision of Art. IX, sec. 5, of the Constitution. *State v. Maultsby*, 583.

The Legislature has complete power to regulate the highways in the State and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and the preservation of the roads and this power may be conferred upon local governing agencies and its being put into effect can be made depedendent upon the action of the board of supervisors. *State v. Holloway*, 642.

It is for the Legislature to prescribe by what methods the roads shall be worked and kept in repair,—whether by labor, by taxation of property, or by funds raised from license taxes, or by a mixture of two or more of these methods—and this may vary in different counties and localities. *State v. Holloman*, 642.

LESSOR AND LESSEE. See "Railroads."

LIEN BONDS.

A contract by the defendant to deliver to the plaintiff lien bonds for an amount sufficient to secure the payment of his notes, vests in the plaintiff, as against the defendant, title to five lien bonds actually delivered in pursuant of said contract, though no specific bonds were mentioned and two of those delivered had not been executed at the date of the contract. *Chemical Co. v. McNair*, 326.

By the assignment of a lien bond, the assignee acquires right and title to the account for securing the payment of which the bond was given. *Chemical Co. v. McNair*, 326.

Where the defendants are fixed with the receipt of the identical money paid on accounts secured by lien bonds which had been assigned to the plaintiff, the plaintiff can recover the amounts thus coming into the defendants' possession. *Chemical Co. v. McNair*, 326.

Where C agreed to sell the guano of O and deliver to O notes of the planters to whom he sold, to be held by O as collateral security, and that all proceeds of guano sold were to be held by C in trust for the payment of his notes, O is entitled to the proceeds of the notes paid to the defendants as against the

LIEN BONDS—*Continued.*

plaintiff to whom the lien bonds securing said notes were assigned, though the plaintiff had no notice of O's claim. *Chemical Co. v. McNair*, 326.

LIFE ESTATES. See "Adverse Possession."

LIMITATION OF ACTIONS.

Upon the question of fraudulent concealment of funds, section 155 (9) of The Code, applies only where the ground of the action for relief is fraud or mistake and the statute runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hitherto unknown to him. *Bonner v. Stotesbury*, 3.

A consent judgment providing that the defendant has an equity to redeem the land upon the payment to the plaintiff of $600, on or before the first day of October next, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under section 152 (3) of The Code, ten years' possession of the defendant, after default, bars the plaintiff. *Bunn v. Braswell*, 135.

When the trustee, in an active trust, is barred by the statute of limitations, the *cestui que trustent* are also barred. *Kirkman v. Holland*, 185.

Where property was conveyed in trust for M during her life, with power of appointment, and on her failure to make the appointment in trust to surrender and deliver up said property to such child, etc., as may be living at her death, and M died in 1903, *held*, that possession by the defendant of said property since 1856, claiming to own the same in fee simple, under a deed from W, who had no title, is adverse to the trustee and bars the plaintiffs, who are the child and grandchild of M. *Kirkman v. Holland*, 185.

Under section 162 of The Code, the statute of limitations does not run in favor of a non-resident, whether it is an individual or a corporation. *Green v. Insurance Co.*, 309.

The statute, which authorizes service of summons against non-resident insurance companies upon the Commissioner of Insurance, does not abrogate or affect the suspension of the running of the statute in such cases. *Green v. Insurance Co.*, 309.

LIMITATION OF ACTIONS—*Continued.*

In an action against a railroad for wrongfully ponding water by permanent structure, the cause of action is barred by the statute of limitations if any substantial injury was done to the land prior to five years next before action brought, under Acts 1895, chap. 224. *Stack v. Railroad,* 366.

In an action of ejectment, where plaintiff showed possession out of the State by a registered grant made in 1822, and *mesne* conveyances to themselves, with evidence of possession in 1866 and 1867 and from 1889 to 1896, a motion to nonsuit was properly denied, where the action was brought in 1902 and the defendant's possession under color did not become exclusive until 1896. *Lindsay v. Austin,* 463.

In an action of ejectment, where at the date of a grant from the State to the defendant, the plaintiffs had failed to show title out of the State either by possession or grant, and also failed to show seven years' possession under color of title since the date of that grant, the court erred in refusing to nonsuit the plaintiffs. *Lindsay v. Austin,* 463.

LOAN OR ADVANCEMENT. See "Insurance."

LOCAL AGENTS. See "Service of Process."

LOST DEEDS. See "Deeds;" "Connor Act."

MALICIOUS PROSECUTIONS.

In an action for malicious prosecution, the declarations of defendant at the time he sued out the warrant of arrest and accompanying that act, are competent as part of the *res gestae,* and also as corroborative testimony. *Merrell v. Dudley,* 57.

MALUM IN SE. See "Offenses."

MALUM PROHIBITUM. See "Offenses."

MANDAMUS.

Where the plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest to the date of tender and cost of advertisement. *Wilson v. Telephone Co.,* 395.

The plaintiff is not entitled to a *mandamus* commanding the board of commissioners to repair the bridge. *Glenn v. Commissioners,* 412.

MARRIAGE. See "Divorce."

MASTER AND SERVANT. See "Principal and Agent;" "Railroads;" "Negligence;" "Fellow Servant Act;" "Assumption of Risk."

Where the servant does a wrong to a third person the rule *respondeat superior* applies, and the master must answer for the tort, if it was committed in the course and scope of the servant's employment and in furtherance of the master's business. *Jackson v. Telephone Co.*, 347.

A servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. *Jackson v. Telephone Co.*, 347.

A finding that the defendant, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect its poles on his land, makes the defendant liable therefor. *Jackson v. Telephone Co.*, 347.

One effect of the Fellow Servant Act (chap. 57, Private Laws 1897,) is to abolish, so far as railroads are concerned, the doctrine known as the Fellow Servant Doctrine, and make the company responsible for the negligent acts of its employees in the course of their service or employment, when by reason of such negligence a fellow servant or other employee is injured. *Mabry v. Railroad*, 388.

Where a rule is habitually violated to the knowledge of the employer or where a rule has been violated so frequently and openly, and for such a length of time, that the employer could by the exercise of ordinary care have ascertained its non-observance, the rule is considered as waived or abrogated. *Biles v. Railroad*, 528.

MENTAL ANGUISH. See "Telegraphs;" "Damages."

MILL-SEAT. See "Fish and Fisheries."

A "mill seat" means the mill house, dam and appurtenances used for operating the mill by water power, and the ground upon which they stand. *State v. Sutton*, 574.

MISJOINDER OF PARTIES.

Where the complaint did not set out any cause of action in favor of one of the plaintiffs, the court properly allowed such plaintiff to submit to a nonsuit it being simply a case of misjoinder of parties plaintiff which may be corrected by taxing him with such costs as are incurred by the misjoinder. *Pritchard v. Mitchell*, 54.

MISTAKE. See "Reformation and Correction;" "Limitation of Actions."

MORTGAGOR AND MORTGAGEE.

A consent judgment providing that the defendant has an equity to redeem the land upon the payment to the plaintiff of $600, on or before the first day of October next, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under section 152 (3) of The Code, ten years' possession of the defendant, after default, bars the plaintiff. *Bunn v. Braswell*, 135.

Where a demurrer, in a proceeding for foreclosure upon the ground that the mortgagor, who had assigned his equity of redemption, was not made a party, was sustained, but no order was made directing him to be made a party, or dismissing the action for failure to do so, no appeal lies at this stage, even if such order is prejudicial. *Bernard v. Shemwell*, 446.

A mortgagor who, since the execution of the mortgage, has parted with his interest in the premises by an absolute conveyance, retaining no longer the equity of redemption, is not a necessary defendant in foreclosing the mortgage. *Bernard v. Shemwell*, 446.

MOTION IN THE CAUSE.

The plaintiff may, by motion in the cause in which he obtained judgment, have an order directed to the defendant corporation to have the assessment made according to its charter and by-laws, and the court has power to enforce its performance by appropriate orders. *Perry v. Insurance Co.*, 375.

MOTION TO DISMISS.

Upon a motion to dismiss an action for want of service, the complaint is not properly before the court. *Higgs v. Sperry*, 299.

Upon a motion to dismiss an action for want of service, the judge should find the facts and not simply that all of the facts set out in the several affidavits are true. *Higgs v. Sperry*, 299.

Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 337.

MOTION TO DISMISS—*Continued.*

A motion to dismiss an appeal will be allowed, where the case was tried in October, 1904, and not docketed until the Fall Term, 1905; the appellant's excuse that the "case on appeal" was not settled by the judge till after it was too late to docket at the Spring Term in time for the call of the district to which it belongs, being of no force. *State v. Telfair*, 555.

MUNICIPAL CORPORATIONS. See "Eminent Domain."

The Charter of Creedmoor (chap. 398, Private Laws 1905,) with reference to condemnation of streets, which provides for notice when the landowner's property is to be appraised and his compensation fixed, is valid though it makes no provision for notifying him of contemplated action by the commissioners. *State v. Jones*, 613.

The provision of the Charter of Creedmoor that one of the appraisers shall be appointed by the commissioners and giving the landowner the right to appoint one and those two shall select a third, with a right of appeal to the Superior Court, is valid, though it omits to provide for the appointment of an appraiser if the landowner refuses and though all the appraisers are freeholders of the town. *State v. Jones*, 613.

As soon as the commissioners in the exercise of the powers delegated to them appropriated the land to a public street, they had the right to enter and open it without awaiting the payment of damages. *State v. Jones*, 613.

The requirement that the report of appraisers shall lie in the mayor's office for 10 days for purpose of investigation and appeal and that unless an appeal is taken from such report "the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid," etc., applies only to the procedure for fixing the price to be paid and means that if no appeal is taken from the appraised value, the land shall stand condemned *at such value* and the appeal does not postpone the right of entry. *State v. Jones*, 613.

MURDER. See "Homicide."

MUTUAL INSURANCE COMPANIES. See "Insurance."

NEGATIVE TESTIMONY. See "Positive and Negative Testimony."

NEGLIGENCE. See "Railroads;" "Rules of Employer;" "Assumption of Risk;" "Contributory Negligence;" "Fellow Servant Act;" "Master and Servant;" "Carriers."

Where goods arrived at destination on Tuesday and were placed upon defendant's wharf (which is not enclosed, but is covered

NEGLIGENCE—*Continued.*

by a tin shed), according to local usage, and plaintiffs were immediately notified of their arrival, were given time to remove them, and paid the freight and removed a part of the same to their place of business on Wednesday, and on that night said goods were damaged by a wind and snow storm, *held*, that these facts do not amount to actionable negligence. *Stone v. Steamship Co.*, 193.

While neither usage or custom, as a general rule, will sanction or excuse an act which the law condemns as negligent, it is pertinent evidence on the question whether there has been negligence in a given case. *Stone v. Steamship Co.*, 193.

In an action by the plaintiff to recover damages for the death of his intestate, the burden is upon the plaintiff to show that the defendant's alleged negligence proximately caused the intestate's death, and the proof must be of such a character as reasonably to warrant the inference of the fact required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact. *Byrd v. Express Co.*, 273.

In an action to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant in failing to forward a package of medicine for the intestate who was ill with typhoid fever, where the attending physician testified that he believed the chances of recovery would have been better had the medicine been received in time and taken according to directions, and that was as far as he could go, and that the medicine was needful and necessary, a motion to nonsuit was properly allowed, as the evidence does not tend to show that the failure to receive the medicine caused the intestate's death. *Byrd v. Express Co.*, 273.

When the employer's property is set on fire by the negligence of another, the employee may attempt to rescue it, but not in the presence of obvious danger, and if he exposes himself rashly to obvious danger solely to rescue property, he cannot recover if he is injured in his attempt. *Pegram v. Railroad*, 303.

Proof that the intestate had escaped from a burning building would absolve the defendant from liability for his death, unless the plaintiff replies by showing that his intestate re-entered the burning building for the purpose of saving his employer's property and that at the time he did so a reasonably prudent person might well have done the same thing. *Pegram v. Railroad*, 303.

An instruction that imposed only one limitation upon the right of an employee to recover his employer's property endangered

NEGLIGENCE—*Continued.*

by fire, viz.: he must not act "recklessly," is erroneous. *Pegram v. Railroad*, 303.

Although a carrier has no knowledge of the contents of trunks, which contain samples, yet some care at least should be taken of the trunks after they arrive at their destination, and it has no right to leave them for three days on the platform of its depot exposed to the weather. *Trouser Co. v. Railroad*, 382.

The North Carolina Railroad Company is responsible for actionable negligence of the Southern Railway Company done in the operation of the road under the former's lease, and in the exercise of its franchise. *Mabry v. Railroad*, 388.

One effect of the Fellow Servant Act (chap. 57, Private Laws 1897,) is to abolish, so far as railroads are concerned, the doctrine known as the Fellow Servant Doctrine, and make the company responsible for the negligent acts of its employees in the course of their service or employment when by reason of such negligence a fellow servant or other employee is injured. *Mabry v. Railroad*, 388.

In an action for damages for an injury from a collision, with defendant's train, the burden of proof was upon the plaintiff to show that the alleged negligence of the engineer in not stopping his train sooner than he did was not only the cause, but the proximate cause of the injury. *Kearns v. Railroad*, 470.

Evidence that the plaintiff, driving his horse and buggy, crossed the defendant's track and after he had gotten across and when distant from 15 to 40 feet and about the time the engine passed the crossing, the horse began to back and continued backing and backed into the cars; that the engineman was looking out at the plaintiff and slackened the speed of the train, which was going very slowly, and after the plaintiff's buggy struck it stopped very quickly, in fifteen feet of the crossing, according to one witness, and within two or three car lengths, according to the plaintiff, *held*, that the plaintiff failed to make out a case of actionable negligence. *Kearns v. Railroad*, 470.

In an action for damages for death by wrongful act, an instruction that "whenever an adult has been killed and his administrator brings suit * * * it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that, it is the duty of the jury to say that he is not entitled to recover anything," is erroneous. *Carter v. Railroad*, 499.

While the mere working on in the presence of known and dangerous conditions, but in the honest effort to discharge his duty

NEGLIGENCE—*Continued.*

faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases against railroads from injuries from defective appliances, the plaintiff is absolved from all care on his own part. *Biles v. Railroad*, 528.

NEGOTIABLE INSTRUMENTS. See "Non-Negotiable Instruments."

In an action on a note, it is error to hold that the mere introduction of the note, with the name of an endorsee written on the back, is evidence of its endorsement by such endorsee, so as to vest the legal title in the plaintiff and cut off any defenses against the endorsee, as the signature of the endorsers, where endorsement is required to vest the legal title, must be proved. *Tyson v. Joyner*, 69.

In an action on a note, the mere introduction of the note raises a presumption that the holder is only the equitable owner, and it is subject to any equities or other defenses of the maker against prior holders. *Tyson v. Joyner*, 69.

A note payable to order must be specially endorsed by the payee (and prior endorsees, if any,) to the holder or at least in blank to make him its legal owner and the *bona fide* holder of a title goood against prior equities of which he is not shown to have had notice. *Tyson v. Joyner*, 69.

NON-NEGOTIABLE INSTRUMENTS.

By the assignment of a lien bond, the assignee acquires right and title to the account for securing the payment of which the bond was given. *Chemical Co. v. McNair*, 326.

Notice to the debtor of the assignment of a non-negotiable instrument is necessary to protect the assignee from the effect of a payment to the original creditor, but such notice is not necessary to the validity of the assignment as between the assignor and asignee. *Chemical Co. v. McNair*, 326.

Where the defendants are fixed with the receipt of the identical money paid on accounts secured by lien bonds which had been assigned to the plaintiff, the plaintiff can recover the amounts thus coming into the defendants' possession. *Chemical Co. v. McNair*, 326.

NON-RESIDENTS.

Under section 162 of The Code, the statute of limitations does not run in favor of a non-resident, whether it is an individual or a corporation. *Green v. Insurance Co.*, 309.

NONSUIT.

Where the complaint did not set out any cause of action in favor of one of the plaintiffs, the court properly allowed such plaintiff to submit to a nonsuit, it being simply a case of misjoinder of parties plaintiff which may be corrected by taxing him with such costs as are incurred by the misjoinder. *Pritchard v. Mitchell*, 54.

In an action for the wrongful cancellation of an assessment policy, where the plaintiff, becoming alarmed at the defendant's ceasing to write assessment policies and the increasing annual assessments, ceased to pay, and the defendant cancelled his policy, a judgment of nonsuit was proper where the plaintiff failed to show that his assessments were increased by reason of the defendant's ceasing to write assessment insurance or that he was discriminated against, and there was nothing in the charter or the policy requiring the defendant to continue writing assessment insurance. *Green v. Insurance Co.*, 309.

It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff. *Kearns v. Railroad*, 470.

On a motion for nonsuit or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true and construed in the light most favorable for him. *Biles v. Railroad*, 528.

NOTES AND BONDS. See "Negotiable Instruments."

NOTICE TO PRODUCE PAPERS. See "Documentary Evidence."

OFFENSES.

An offense *malum in se* is one which is naturally evil, as murder, theft and the like. Offenses at common law are generally *malum in se*. An offense *malum prohibitum*, on the contrary, is not naturally evil, but becomes so in consequence of being forbidden. *State v. Horton*, 588.

OFFICERS. See "Corporations."

PARENTAL RELATIONS. See "Adverse Possession."

PAROL EVIDENCE.

A deed from a trustee which not only refers to the deed of trust as containing the land the trustee sold, but goes on with a fuller description, as follows: "A tract of land up the Mill Pond Road of 60 acres more or less, being all said W owned adjoining R and others' lands," is sufficient to permit parol evidence in aid of the description. *Hinton v. Moore*, 44.

PAROL EVIDENCE—*Continued.*

The Connor Act (Laws 1887, chapter 47,) applies both to lost and unlost deeds executed after December 1, 1885, and there was no error in rejecting parol evidence to show that plaintiff's grantor deeded the land in controversy to W in 1891 and that said deed had been lost before registration, where plaintiff was a purchaser for value of said title under registered conveyances. *Hinton v. Moore,* 44.

A deed made to "Jas. Webb, Jr., & Bro.," a partnership name and style adopted by the distributees and legatees of the deceased partners, is valid, though the partners are not named in the deed, it being a latent ambiguity which may be explained by parol. *Walker v. Miller,* 448.

PARTIES.

A mortgagor who, since the execution of the mortgage, has parted with his interest in the premises by an absolute conveyance, retaining no longer the equity of redemption, is not a necessary defendant in foreclosing the mortgage. *Bernard v. Shemwell,* 446.

The court may at any time before or after judgment direct other persons to be made parties to the end that substantial justice be done. *Walker v. Miller,* 448.

PARTNERSHIP.

The death of a partner, in the absence of any stipulation in the articles of co-partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. *Walker v. Miller,* 448.

An arrangement between distributees and legatees to permit their property with the consent and co-operation of the personal representatives of deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership. *Walker v. Miller,* 448.

A deed made to "Jas. Webb, Jr.. & Bro.," a partnership name and style adopted by the distributees and legatees of the deceased partners, is valid, though the partners are not named in the deed, it being a latent ambiguity which may be explained by parol. *Walker v. Miller,* 448.

PAYMENT. See "Wills."

PAYMENT OF DAMAGES. See "Eminent Domain."

PENALTIES. See "Fines."

Under section 188 of The Code, an action for a penalty, against a register of deeds and the surety on his official bond, abates by the death of the officer. *Wallace v. McPherson*, 297.

Under laws 1905, chap. 259, the State prosecutes for misdemeanor and the board of supervisors can sue for the penalty. *State v. Holloman*, 642.

The Legislature has power to give "penalties," which must be sued for, either wholly or in part to whomsoever shall sue for the same, and only the clear proceeds of such as accrue to the State go to the school fund under the provision of Art. IX, sec. 5, of the Constitution. *State v. Maultsby*, 583.

PERMANENT ROLL. See "Voter."

PERSONAL EXPENSES. See "Damages."

PERSONAL TRANSACTION. See "Evidence."

PLACE OF TRIAL. See "Venue of Actions."

PLEADINGS. See "Appeal and Error."

Where the plaintiff moved below to amend his complaint, and the court intimated that it would allow the amendment if the plaintiff's evidence was sufficient to warrant it, but by reason of an erroneous exclusion of testimony, the plaintiff was prevented from developing his whole case and was driven to a nonsuit, this court will not dismiss the action either because the complaint is defective or because the cause of action as stated is barred by the statute of limitations. *Bonner v. Stotesbury*, 3.

In an action for the possession of a mule, it was in the discretion of the court to allow the plaintiff to amend his complaint, which alleged simply ownership and wrongful detention, by setting out allegations of fraud and deceit on the part of the defendant in obtaining possession of the mule in a trade, such amendment being in no sense the introduction of a new cause of action. *Joyner v. Early*, 49.

Where the complaint did not set out any cause of action in favor of one of the plaintiffs, the court properly allowed such plaintiff to submit to a nonsuit, it being simply a case of misjoinder of parties plaintiff which may be corrected by taxing him with such costs as are incurred by the misjoinder. *Pritchard v. Mitchell*, 54.

Where the defendant, in reply to plaintiff's letter of inquiry about W, stated that "we regard W as a reliable and trustworthy gentleman with whom your samples and sales will be entirely

PLEADINGS—*Continued.*

safe, and doubly so as all tobacco of yours that might be shipped would come direct to our warehouse, and payment for all such tobacco would be made by us to you for all sales," *held*, the defendant's demurrer on the ground that the letter did not constitute a guaranty was properly sustained. *Hughes v. Warehouse Co.*, 158.

Where a complaint alleges that the plaintiff, at a sale by a commissioner to make assets, purchased at a certain price per acre, a tract of land, the commissioner representing that said land contained 416 acres, and bids being asked for at so much per acre, and paid for 416 acres, and subsequently ascertained that the tract contained only 320 acres, *held*, that a cause of action is set up, in seeking to correct an overpayment by reason of an error in calculating the amount due, when there is no *laches* shown as to the purchaser and no change of condition by reason of which correction would work a prejudice to those for whose interest the land was sold. *Peacock v. Barnes*, 196.

The issues arise upon the pleading and not upon evidential facts, but where there are no written pleadings, it is the duty of the court to so frame the issues after hearing the evidence, as to develop the whole case and to present to the jury the real issues of fact in dispute. *Coxe v. Singleton*, 361.

A complaint alleged that the defendant negligently failed to deliver the following message sent by plaintiff from Newport News, Va., to Fayetteville, N. C.: "How is mother today? Let me know at once and I will come at once," and that by reason thereof the plaintiff suffered mental anguish, knowing that his mother was sick and that he was forced to go to Fayetteville, at great expense; and that when he reached there he found his mother better, *held*, that a demurrer for that no mental anguish was recoverable was properly overruled, as the cost of the trip is an element of damage, and the allegation as to mental anguish is not stated as a separate cause of action, but as a further element of damage. *Hall v. Telegraph Co.*, 369.

The complaint averring that the contract was made in Virginia, the rights of the parties will be determined by the laws of Virginia, so far as the same apply. *Hall v. Telegraph Co.*, 369.

Where the clerk of the court of G. county issued a notice to the respondent who had the will of the deceased in his possession to exhibit the same for probate it was the duty of the respondent to obey the summons and he could have raised in his answer the question of whether the will should be probated in G. or L. county. *In re Scarborough Will*, 423.

PLEADINGS—*Continued.*

Where a demurrer, in a proceeding for foreclosure upon the ground that the mortgagor, who had assigned his equity of redemption, was not made a party, was sustained, but no order was made directing him to be made a party, or dismissing the action for failure to do so, no appeal lies at this stage, even if such order is prejudicial. ***Bernard v. Shemwell*, 446.**

In an action to recover on a specific contract for services rendered to the testator, where the complaint failed to allege in specific terms that the plaintiff fully performed the contract on her part, or that she was prevented from performing it by the testator, or by those authorized to act for him, it should be redrafted as to those particulars or properly amended. ***Tussey v. Owen*, 457.**

PLEDGES. See "Banks and Banking."

POLICE POWER. See "Constitutional Law."

Chapter 292 of the Acts of 1905, making it unlawful to set or fish any nets in certain sections of Albemarle and Pamlico Sounds, from January 15 to May 15 in each year, and providing that any person who shall violate said act shall be guilty of a misdemeanor and further providing that the Oyster Commissioner shall seize all nets setting or being used in violation of said act, sell the same at public auction and apply the proceeds to the payment of cost of removal and pay any balance to the school fund is a constitutional exercise of the police power. ***Daniels v. Homer*, 219.**

There is no individual or property right of fishery in the waters of Albemarle and Pamlico Sounds, but such right rests in the State, and is subject absolutely to such regulations as the General Assembly may prescribe and can be exercised only at such times and by such methods as it may see fit to permit. ***Daniels v. Homer*, 219.**

PONDING WATER. See "Railroads."

POSITIVE AND NEGATIVE TESTIMONY.

Where it was material for the State to show that the prisoner fired the fatal shot, and several witnesses were introduced who swore positively that when the fourth shot was fired the weapon was in the hands of the prisoner, while other witnesses testified that they did not see the pistol, and did not know in whose hands it was when the fourth shot was fired, an instruction that it was the jury's duty to give to positive testimony greater weight than they give to negative testimony, and that the testimony of the former witnesses was that the law terms

POSITIVE AND NEGATIVE TESTIMONY—*Continued.*

positive, and that the testimony of the latter was negative, was proper, where the judge followed it up by adding an instruction that left the credibility of the witnesses to the jury. *State v. Murray*, 540.

POSSESSION. See "Adverse Possession."

PRACTICE. See "Appeal and Error;" "Injunctions;" "Amendments;" "Penalties;" "Costs;" "Case on Appeal."

Where the plaintiff moved below to amend his complaint, and the court intimated that it would allow the amendment if the plaintiff's evidence was sufficient to warrant it, but by reason of an erroneous exclusion of testimony, the plaintiff was prevented from developing his whole case and was driven to a nonsuit, this court will not dismiss the action either because the complaint is defective or because the cause of action as stated is barred by the statute of limitations. *Bonner v. Stotesbury*, 3.

While this court has the power of amendment, it will not exercise this power where the amendment would, perhaps, present a case substantially different from the one which was tried below and raise a question of law not involved in the present appeal. *Bonner v. Stotesbury*, 3.

Where at the first trial of the case judgment was entered for the defendants and the plaintiff appealed and a new trial was granted, and at the second trial, the defendants again recovered and in the judgment, the plaintiff was taxed with all the costs of the defendants in the action, except the costs of appeal, *held*, the plaintiff's exception to the judgment upon the ground that he was not taxable with any of the costs of the first trial, was without merit; sections 525-6 and 540 of The Code, relating to taxation of costs, refer to a final recovery upon the merits. *Williams v. Hughes*, 17.

Where a party requests the court to charge the jury that if they believe the evidence they should answer the issue in his favor, the adverse party is entitled to have the evidence considered most strongly in his favor and all facts which it reasonably tends to prove for him must be considered established, and any part of the evidence which tends to disprove the contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit, and where the evidence on the issue was not all one way, the instruction was not a proper one. *Board of Education v. Makely*, 31.

Where the defendant obtained possession of a mule in a trade with the plaintiff by false, fraudulent and deceitful representa-

PRACTICE—*Continued.*

tions, the plaintiff may sue for damages for the false warranty or repudiate the trade and sue to recover the specific property. *Joyner v. Early*, 49.

On hearings for injunctions the title is not required to be proved with that strictness and certainty of proof as upon the trial. *Moore v. Fowle*, 51.

The Act of 1901, chapter 666, is not a limitation upon the power of the courts to continue injunctions until the controversy can be decided by court and jury, but was intended to preserve the timber upon lands in litigation pending the suit and throws greater safeguards around the rights of litigants, and when the plaintiff satisfies the judge that his claim is *bona fide* and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined. *Moore v. Fowle*, 51.

Where the complaint did not set out any cause of action in favor of one of the plaintiffs, the court properly allowed such plaintiff to submit to a nonsuit, it being simply a case of misjoinder of parties plaintiff which may be corrected by taxing him with the costs incurred by the misjoinder. *Pritchard v. Mitchell*, 54.

The writ of *habeas corpus* can never be made to perform the office of a writ of error or appeal. The investigation is confined to the question of jurisdiction or power of the judge to proceed as he did, and the merits of the controversy are not passed upon. *Ex Parte McCown*, 95.

In *habeas corpus* proceedings, this court is bound by the judge's findings of fact which were spread upon the record as required by the statute. *Ex Parte McCown*, 95.

In direct contempts, the proceedings are generally of a summary character and there is no right of appeal, the facts being stated in the committal, attachment or process and reviewable by *habeas corpus*, while in indirect contempts the proceedings are commenced by citation or rule to show cause, with the right of answer and to be heard in defense, and also with the right of appeal. *Ex Parte McCown*, 95.

The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in. *Corporation Commission v. Railroad*, 126.

The approval by the judge of the clerk's findings of fact is conclusive, unless the exception, for that there is no evidence to sustain them, can be sustained. *Carraway v. Lassiter*, 145.

PRACTICE—*Continued.*

Where a petition for license to sell land was filed on October 12th, and the clerk, on the 15th day of the same month and before any summons was issued, made an order appointing a guardian *ad litem*, this was irregular, but the service of process upon the infant defendant and the guardian *ad litem*, followed by the filing of an answer by him, cured the irregularity in the order of appointment. *Carraway v. Lassiter*, 145.

In the absence of an order to suspend further proceedings upon the filing of a *caveat*, as provided by section 2160 of The Code, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. *Carraway v. Lassiter*, 145.

If the justice fails to discharge his duty to make his "return of appeal," he may be compelled to do so by attachment, and if the return be defective, the judge may direct a further or amended return. *Hawks v. Hall*, 176.

Where the judge set aside the report of commissioners because the report did not comply with the statute, and further found as a fact in his order that two of the commissioners had been guilty of gross indiscretion, this court would not reverse his order, whether the report conformed to the statute or not. *Porter v. Armstrong*, 179.

Where two issues are independent of and clearly severable from the others, it presents a proper case for the exercise of the discretion of this court to restrict the new trial to said two issues. *Yarborough v. Hughes*, 199.

The fact that proceedings had been instituted before a Highway Commission to acquire a right of way for a tramway or railway, and were pending in the Superior Court, does not prevent the court from interfering by injunction with the construction of the proposed railway, where the result of that proceeding could not affect the plaintiff's right to enjoin the defendants. *Cozard v. Hardwood Co.*, 283.

Upon a motion to dismiss an action for want of service, the complaint is not properly before the court. *Higgs v. Sperry*, 299.

Upon a motion to dismiss an action for want of service, the judge should find the facts and not simply find that all of the facts set out in the several affidavits are true. *Higgs v. Sperry*, 299.

In an action for rent begun before a justice of the peace where the defendant denied plaintiff's title and lease, the justice properly dismissed the action. *Hudson v. Hodge*, 308.

PRACTICE—*Continued.*

The issues arise upon the pleadings and not upon evidential facts, but where there are no written pleadings, it is the duty of the court to so frame the issues after hearing the evidence, as to develop the whole case and to present to the jury the real issues of fact in dispute. *Coxe v. Singleton*, 361.

Merely craving an appeal is not *taking* an appeal. An appellant must look after his case and see that his appeal is made effectual. *Love v. Love*, 363.

There is no law or practice which will permit a tender of judgment of one dollar as nominal charges as an aid to a defective demurrer. *Hall v. Telegraph Co.*, 369.

Upon appeal from an order of the clerk adjudging the respondent in contempt, there was no error in the judge allowing additional affidavits to be filed on the hearing before him. *In re Scarborough Will*, 423.

In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and cannot be passed upon. *In re Scarborough Will*, 423.

Where the clerk of the court of G. county issued a notice to the respondent who had the will of the deceased in his possession to exhibit the same for probate, it was the duty of the respondent to obey the summons and he could have raised in his answer the question of whether the will should be probated in G. or L. county. *In re Scarborough Will*, 423.

Section 578 of The Code, which provides that the clerk or judge may in their discretion order either party to give to the other an inspection and copy, or permission to take a copy of any papers containing evidence relative to the merits of the action, does not authorize an order that the respondent be required to *deposit the papers* in the clerk's office. *Mills v. Lumber Co.*, 524.

There is no authority given to a justice of the peace to grant a new trial in a criminal case after he has made a final disposition of it. *State v. Lucas*, 567.

Under Laws 1905, chap. 259, the State prosecutes for the misdemeanor and the board of supervisors can sue for the penalty. *State v. Holloman*, 642.

PRAYERS FOR INSTRUCTIONS. See "Instructions."

PREMATURE APPEAL. See "Appeal and Error."

PREMEDITATION AND DELIBERATION. See "Homicide."

PRESENTATION OF PORTRAIT OF JUDGE SETTLE, 649.

PRESUMPTIONS.

In an action on a note, the mere introduction of the note raises a presumption that the holder is only the equitable owner, and it is subject to any equities or other defenses of the maker against prior holders. *Tyson v. Joyner*, 69.

A by-law of the defendant company which provided that any member failing to pay his assessment within sixty days from date of notice (which date shall be the day of mailing said notice) shall forfeit all rights in the company, is subject to rebuttal on the part of the plaintiff by showing non-receipt of notice, the defendant having properly postpaid and addressed the same. *Sherrod v. Insurance Asso.*, 167.

The presumption of payment from the lapse of time arises only between the executor and legatee, between debtor and creditor, it being a protection to discharge a liability and it cannot arise to create a liability to a third person on the part of the person who should have received the legacy. *Outlaw v. Gardner*, 190.

Where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control, and offers in lieu of their production secondary or other evidence of inferior value, there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case. *Yarborough v. Hughes*, 199.

Where the pleadings themselves are notice to a party of the importance of certain writings in his possession, as evidence, notice to produce is not necessary. The failure to produce on notice merely increases the strength of the presumption or inference, or adds weight to the evidence, if any, offered by the other side as to their contents. *Yarborough v. Hughes*, 199.

PRINCIPAL AND AGENT. See "Master and Servant."

Where a contract which was intended to be a satisfaction of all notes, drafts and accounts of plaintiff's creditors, was signed by defendant's intestate "representing A," who did not hold any such claim, but only was an endorser on plaintiff's notes to A, the fact that the intestate's name appears in the body of the contract does not impose a personal liability upon him. *Hicks v. Kenan*, 337.

Where an agent acts within the scope of his authority and professes to act in the name and behalf of his principal, he is not personally liable. *Hicks v. Kenan*, 337.

PRINCIPAL AND AGENT—*Continued.*

Where the question of agency in making a contract arises there is a distinction between instruments under seal and those not under seal. In the former case, the contract must be in the name of the principal and must purport to be his deed. In the latter, the question is always one of intent, and when the meaning is clear, it matters not how it is phrased nor how it is signed. *Hicks v. Kenan*, 337.

The court must be satisfied that an agency has been shown at least *prima facie*, before anything that the alleged agent has said or done can be submitted to the jury as evidence. *Jackson v Telephone Co.*, 347.

In passing upon the question of agency, the court did not err in permitting the jury to consider "any evidence of the acts of M (an alleged agent), in connection with the work of the defendant, and whether the defendant was putting up the poles on the land claimed by the plaintiff, and whether M was in charge of the construction work with authority, and whether he was in control of the labor and material and gave direction" as to how the work should be done. *Jackson v. Telephone Co.*, 347.

Where the jury found that the defendant's agent arrested the plaintiff not because the plaintiff had assaulted him, but to put him out of the way, and thereby prevent his resistance to an entry upon the land, it was a case where vindictive damages were allowable. *Jackson v. Telephone Co.*, 347.

PRINCIPAL AND SURETY.

Laws of 1893, chapter 453, section 1, which enacts: "That upon the execution of any voluntary deed of trust, or deed of assignment for the benefit of creditors, all debts of the maker thereof shall become due and payable at once," applies to the sureties upon a note of the assignor. *Pritchard v. Mitchell*, 54.

Where a contractor failed to complete plaintiff's houses according to contract, and the latter completed them himself by direction of the defendant, who, as surety for the contractor, covenanted to pay all damages which should occur by the failure of the contractor to comply with his contract, *held*, that the defendant is not liable for a deficiency arising from the plaintiff's having accepted drafts from the contractor for labor and material for more than enough to absorb the sum which was due the contractor. *Donlan v. Trust Co.*, 212.

The court erred in holding that $100, which was admitted to be a reasonable charge for the plaintiff's services in supervising the completion of the houses was a proper charge only against

PRINCIPAL AND SURETY—*Continued.*

the contractor. It was damages chargeable against the defendant surety, and could not be retained by the plaintiff out of the funds due the contractor, in preference to claims for labor and material. *Donlan v. Trust Co.*, 212.

In an action against the defendant as surety for a defaulting contractor, a charge made by the plaintiff for lawyer's fee was properly disallowed. *Donlan v. Trust Co.*, 212.

The damage sustained by the plaintiff for loss of rents which he should have received had the contractor completed the houses by the time specified in the contract, directly flows from the breach of the builder's contract, and is within the terms of the defendant's contract of suretyship. *Donlan v. Trust Co.*, 212.

Under section 188 of The Code, an action for a penalty, against a register of deeds and the surety on his official bond, abates by the death of the officer. *Wallace v. McPherson*, 297.

PRIVITY OF ESTATE. See "Adverse Possession."

PROBATE OF WILLS. See "Wills."

PRODUCTION OF PAPERS. See "Documentary Evidence."

Section 578 of The Code, which provides that the clerk or judge may in their discretion order either party to give to the other an inspection and copy, or permission to take a copy of any papers containing evidence relative to the merits of the action, does not authorize an order that the respondent be required to *deposit the papers* in the clerk's office. *Mills v. Lumber Co.*, 524.

PROVISOS.

While a proviso relates generally to what immediately precedes it, and is confined by construction to the subject matter of the section of which it is a part, yet if the context requires it, the proviso may be construed as extending to and qualifying other sections or even as being tantamount to an independent provision, the main object being to enforce the will of the Legislature as it is manifested by the entire enactment. *Propst v. Railroad*, 397.

PROXIMATE CAUSE. See "Negligence."

PUBLIC HIGHWAYS AND BRIDGES. See "County Commissioners."

PUBLIC LANDS. See "Vacant Lands."

PUBLIC USE. See "Eminent Domain."

PURCHASERS FOR VALUE. See "Judicial Sales;" "Connor Act."

In the absence of fraud, a purchaser at a judicial sale, is only required to see that the court has jurisdiction of the person and the subject matter for his protection. *Carraway v. Lassiter*, 145.

In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by section 2160 of The Code, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. *Carraway v. Lassiter*, 145.

QUALIFIED VOTER. See "Voter."

QUANTUM MERUIT. See "Contracts."

While in some cases a recovery is permitted upon a *quantum meruit*, when a recovery could not be had upon the contract for the contract price, yet no recovery can be had for the contract price unless the contract has been performed. *Tussey v. Owen*, 457.

QUESTIONS FOR COURT.

Where the call in a deed is for a certain distance to a known and fixed line of another tract, the distance will be disregarded and the line control, but the court should instruct the jury, as a question of law, what the boundaries are, leaving to them the question where they are. *Jennings v. White*, 23.

The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in. *Corporation Commission v. Railroad*, 126.

QUESTIONS FOR JURY.

Where the call in a deed is for a certain distance to a known and fixed line of another tract, the distance will be disregarded and the line control, but the court should instruct the jury, as a question of law, what the boundaries are, leaving to them the question where they are. *Jennings v. White*, 23.

The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Corporation Commission requiring track scales to be put in. *Corporation Commission v. Railroad*, 126.

The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily

QUESTIONS FOR JURY—*Continued.*

an inference of fact from all of the evidence and can only be drawn by the jury. *Carter v. Railroad,* 499.

Where the deadly character of the weapon is to be determined by the relative size and condition of the parties and the manner in which it is used, it is proper and necessary to submit the matter to the jury with proper instructions. *State v. Archbell,* 537.

The existence of premeditation and deliberation is a fact to be found by the jury when there is any evidence to warrant the finding. *State v. Daniel,* 549.

QUIETING TITLE. See "Cloud of Title."

QUITCLAIM DEEDS. See "Deeds."

RAILROADS. See "Corporation Commission;" "Carriers;" "Negligence;" "Fellow Servant Act;" "Assumption of Risk."

The Legislature has the power to supervise, regulate and control the rates and conduct of common carriers, and this regulation may be exercised either directly or through a commission. *Corporation Commission v. Railroad,* 126.

Under the act creating the Corporation Commission, it has the power to require a railroad to put in track scales at such points as the quantity of business may justify it. *Corporation Commission v. Railroad,* 126.

In an action against a railroad for wrongfully ponding water by permanent structure, the cause of action is barred by the statute of limitations if any substantial injury was done to the land prior to five years next before action brought, under Acts 1895, chap. 224. *Stack v. Railroad,* 366.

Evidence that the road bed and culvert were built more than forty years ago, and that the water was ponded in a manner substantially similar to that now complained as much as ten or fifteen years ago, is sufficient to sustain a finding that substantial injury was done prior to five years before action brought, though the plaintiff testified that the ponding had increased of late. *Stack v. Railroad,* 366.

The North Carolina Railroad Company is responsible for actionable negligence of the Southern Railway Company done in the operation of the road under the former's lease, and in the exercise of its franchise. *Mabry v. Railroad,* 388.

One effect of the Fellow Servant Act (chap. 57, Private Laws 1897,) is to abolish, so far as railroads are concerned, the doctrine known as the Fellow Servant Doctrine, and make the company

RAILROADS—*Continued.*

responsible for the negligent acts of its employees in the course of their service or employment, when by reason of such negligence a fellow servant or other employee is injured. *Mabry v. Railroad*, 388.

Chapter 367, Acts 1905, amending section 192 of The Code, with reference to the place of trial of actions against railroads, applies to all railroads, both domestic and foreign. *Propst v. Railroad*, 397.

In an action for damages for an injury from a collision, evidence which merely shows that it was possible that the failure to stop the train caused the injury, or merely raises a conjecture that it was so, is legally insufficient and should not be submitted to the jury. *Kearns v. Railroad*, 470.

In an action for damages for an injury from a collision with defendant's train, the burden of proof was upon the plaintiff to show that the alleged negligence of the engineer in not stopping his train sooner than he did was not only the cause, but the proximate cause of the injury. *Kearns v. Railroad*, 470.

Evidence that the plaintiff, driving his horse and buggy, crossed the defendant's track and after he had gotten across and when distant from 15 to 40 feet and about the time the engine passed the crossing, the horse began to back and continued backing and backed into the cars; that the engineman was looking out at the plaintiff and slackened the speed of the train, which was going very slowly, and after plaintiff's buggy struck it stopped very quickly in 15 feet of the crossing, according to one witness, and within two or three car lengths, according to the plaintiff, *held*, that the plaintiff failed to make out a case of actionable negligence. *Kearns v. Railroad*, 470.

In an action for damages for death by wrongful act, an instruction that "whenever an adult has been killed and his administrator brings suit * * * it is necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures, and unless he has done that, it is the duty of the jury to say that he is not entitled to recover anything," is erroneous. *Carter v. Railroad*, 499.

Under sections 1498-9 of The Code, the question is, did the relatives suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased. *Carter v. Railroad*, 499.

RAILROADS—*Continued.*

The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. *Carter v. Railroad,* 499.

In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant, by reason of the Fellow Servant Act. *Biles v. Railroad,* 528.

While the mere working on in the presence of known and dangerous conditions, but in the honest effort to discharge his duty faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases against railroads from injuries, from defective appliances, the plaintiff is absolved from all care on his part. *Biles v. Railroad,* 528.

Except in extraordinary and imminent cases, like those of Greenlee and Troxler cases, the plaintiff in actions for negligence against railroads is required to act with that due care and circumspection which the presence of such conditions require, and if apart from the element of assumption of risk, he has been careless in a manner which amounts to contributory negligence, his action must fail. *Biles v. Railroad,* 528.

The violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. *Biles v. Railroad,* 528.

REAL PARTY IN INTEREST. See "Insurance."

Where a cause of action is assignable, either at law or in equity, the assignee is the real party in interest and the equitable owner of any species of property or right of action must prosecute in his own name. *Cunningham v. Railroad,* 427.

When the insurer against fire has paid the loss sustained, it is subrogated to the rights of the insured and can alone, under section 177 of The Code, as the real party in interest, maintain an action against the wrongdoer, and this right to be subrogated is independent of section 44, chapter 54, Laws 1899, and it is immaterial whether the insured makes an actual assignment or not. *Cunningham v. Railroad,* 427.

RECITAL OF EVIDENCE.

An error in reciting the evidence is cured by the failure of counsel to call it then and there to the attention of the court and have it corrected. *State v. Murray*, 540.

REFORMATION AND CORRECTION.

To correct a bond for title on the ground of mistake, the evidence must be strong, clear and convincing, and where there is any evidence to go to a jury on the question, they are to determine, under proper instructions whether the evidence is of the character required. *King v. Hobbs*, 170.

Where both the plaintiff and defendant testified that before they went to a justice of the peace to have a bond for title written, they had come to a definite contract of sale of the land, and that the timber previously sold and conveyed to a lumber company was excepted, a prayer for instruction "that there was no evidence to show that the clauses, exempting from the bond the right and interest of the lumber company in the land, were omitted from said bond by mutual mistake of the parties," was properly denied. *King v. Hobbs*, 170.

Where a complaint alleges that the plaintiff, at a sale by a commissioner to make assets, purchased at a certain price per acre, a tract of land, the commissioner representing that said land contained 416 acres, and bids being asked for at so much per acre, and paid for 416 acres, and subsequently ascertained that the tract contained only 320 acres, *held*, that a cause of action is set up, in seeking to correct an overpayment by reason of an error in calculating the amount due, when there is no *laches* shown as to the purchaser and no change of condition by reason of which correction would work a prejudice to those for whose interest the land was sold. *Peacock v. Barnes*, 196.

Where the plaintiff's land was advertised for sale under a deed of trust and prior to the sale the defendant made a contract with the plaintiffs, agreeing to buy the land for himself with the stipulation that he would sell it to the plaintiffs for the amount of the purchase money paid by him, "with a reasonable advance thereon," as a profit to himself, the total sum to be divided into three instalments, and when the instalments were paid in full, the defendant should convey the land to the plaintiffs, the full agreement to be reduced to writing after the sale; and the defendant bought the land at the sale for $1,475, and he and the plaintiff entered into a contract containing substantially the above stipulations, except that it fixed the amount of the purchase money at $2,115, *held*, that the plaintiffs have no equity to cancel or to reform the contract,

REFORMATION AND CORRECTION—*Continued.*

there being no suggestion that defendant occupied any fiduciary relation to them at the time, or that there was any fraud practiced, and no issue asked as to the reasonableness of the price. *Yarborough v. Hughes*, 199.

REGISTRATION. See "Deeds."

REGISTER OF DEEDS.

Under section 188 of The Code, an action for a penalty, against a register of deeds and the surety on his official bond, abates by the death of the officer. *Wallace v. McPherson*, 297.

REGISTERED VOTER. See "Voter."

REGISTRATION. See "Voter."

REMAINDERS.

Where lands were devised to a daughter for life "and after her death, the said lands are to go to the children of my said daughter and the children of such as are dead," and the life tenant, who is living, had several children, one of whom married and died, leaving the plaintiffs the issue of such marriage, *held*, the plaintiffs have but a contingent remainder, which may never vest, and they cannot during the life of the life tenant maintain an action for waste for timber cut. *Latham v. Lumber Co.*, 9.

While the owner of the inheritance, either by way of reversion or vested remainder can maintain an action for waste, yet one entitled to a contingent remainder cannot maintain such an action, but the interest of a contingent remainderman in the timber will be protected by a Court of Equity by injunction. *Latham v. Lumber Co.*, 9.

In a special proceeding by an executor to sell the lands of his testatrix to make assets to pay her debts, a devisee (without children), to whom the entire estate was given for life, remainder to such children as she might leave surviving, and in default of issue to an asylum, represented the entire title for the purpose of enabling the court to proceed in the cause, and children thereafter born to her are bound by the judgment. *Carraway v. Lassiter*, 145.

A person indebted cannot, by devising his lands, upon contingent limitations to parties not *in esse*, prevent their sale for payment of his debts until all who may by possibility take are born or every possible contingency is at an end. *Carraway v. Lassiter*, 145.

REMAINDERS—*Continued.*

To create any liability on the part of the legatee over to the remainderman, there must be proof that the legatee recovered the sum. *Outlaw v. Garner*, 190.

A sale and conveyance by the sheriff under the Revenue Act of 1874-5, of the lands of a life tenant for default in payment of taxes on his part, does not operate to convey the interest of the remainderman. *Smith v. Proctor*, 314.

REMEDY OF POLICY HOLDERS. See "Insurance."

REPEAL OF STATUTES. See "Statutes;" "Provisos."

REPUGNANT CLAUSES. See "Deeds."

RESCUING PROPERTY FROM FIRES. See "Negligence."

RES GESTAE. See "Evidence."

RES JUDICATA. See "Administrative Order."

RESISTING ARREST. See "Arrest."

RETURN TO NOTICE OF APPEAL. See "Justices of Peace."

ROADS.

Chapter 259, Laws 1905, prescribing a method for working the roads in Hertford County and providing in section 17 thereof that any person desiring to use the roads of a township for the carrying on of his business of hauling mill logs or other heavy material with log wagons or other heavy vehicles, shall first obtain a license by paying an annual license tax to the board of supervisors, and further providing that any person violating this section shall be guilty of a crime and liable to a penalty, deprives no citizen of any right to use the highway. It does not restrain trade, nor is it oppressive, but exceedingly equitable. *State v. Holloman*, 642.

Where, under the authority of section 23, providing that section 17, above set out, shall not be enforced by any township unless a majority of the board of supervisors of that township shall vote to enforce it, a majority of the board of a certain township adopted the provisions of section 17, the defendant cannot avail himself of the fact that no written notice of the action of the board was served upon him, as the law did not require written notice and it appears that he had verbal notice. *State v. Holloman*, 642.

The Legislature can provide a special road law and method of working the public roads for a county, or several counties, or a

ROADS—*Continued.*

township or other locality, and make the adoption of such system depend upon the acceptance or rejection thereof by the people or the landholders, or by the official board of such county, township or locality. *State v. Holloman,* 642.

The Legislature has complete power to regulate the highways in the State and may prescribe what vehicles may be used on them, with a view to the safety of passengers over them and the preservation of the roads, and this power may be conferred upon local governing agencies and its being put into effect can be made dependent upon the action of the board of supervisors. *State v. Holloman,* 642.

It is for the Legislature to prescribe by what methods the roads shall be worked and kept in repair,—whether by labor, by taxation of property, or by funds raised from license taxes, or by a mixture of two or more of these methods—and this may vary in different counties and localities. *State v. Holloman,* 642.

RULE IN SHELLEY'S CASE.

Where by a clause in a will, land is given to P "for life, and after his death to his heirs (lawful) forever," P took an estate in fee simple under the Rule in Shelley's Case. *Pitchford v. Limer,* 13.

Where the words "heirs of H" in the deed is clearly not intended to denote the whole line of heirs to take in succession as said heirs from "generation to generation," but is simply only a *designatio personae,* meaning lawful child or children of H who may be living at his death, the Rule in Shelley's Case does not apply. *Smith v. Proctor,* 315.

RULES OF CONSTRUCTION. See "Deeds."

RULES OF EMPLOYER.

The violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. *Biles v. Railroad,* 528.

Where a rule is habitually violated to the knowledge of the employer or where a rule has been violated so frequently and openly, and for such a length of time, that the employer could by the exercise of ordinary care have ascertained its non-observance, the rule is considered as waived or abrogated. *Biles v. Railroad,* 528.

RULES OF SUPREME COURT. See "Practice."

Rule 16. Docketing Appeals. *State v. Telfair,* 555.
Rule 27. Assignment of Errors. *Hicks v. Kenan,* 338.

SALE OF LAND FOR ASSETS. See "Executors and Administrators."

SALES. See "Judicial Sales."

Where the plaintiff's stock in the defendant company was advertised for sale for failure to pay a certain amount due thereon, and the plaintiff before the sale tendered the secretary of the company in cash more than said amount and told him he would tender more if that was not enough, and the secretary did not allege that any more was due, but simply declined to accept payment, *held*, this was a legal tender and the subsequent sale of the stock was void. *Wilson v. Telephone Co.*, 395.

An agreement to deliver one-half gallon of whiskey, entered into by the defendant in a city where the sale of liquor is prohibited, and the receipt of the agreed price and delivery of the whiskey by the defendant within said city in pursuance of the agreement, constitute a sale of liquor on the part of the defendant within the prohibited territory. *State v. Johnston*, 640.

SAMPLES. See "Carriers."

SATISFACTION.

Discussion of the equitable doctrine of satisfaction. *Stocks v. Cannon*, 60.

SCALES. See "Corporation Commission."

SCHOOL FUND.

Fines, from their very nature, being punishment for violation of the criminal law, are imposed in favor of the State and belonging to the State, the Legislature cannot appropriate their clear proceeds to any other purpose than the school fund. *State v. Maultsby*, 583.

SELF-DEFENSE. See "Excusable Homicide."

SERVICE OF PROCESS. See "Guardian and Ward."

Upon a motion to dismiss an action for want of service, the complaint is not properly before the court. *Higgs v. Sperry*, 299.

Upon a motion to dismiss an action for want of service, the judge should find the facts and not simply find that all of the facts set out in the several affidavits are true. *Higgs v. Sperry*, 299.

Under section 217 of The Code, a traveling auditor of a foreign corporation, which had ceased to do business in the State, is not an officer upon whom process can be served. *Higgs v. Sperry*, 299.

SERVICE OF PROCESS—*Continued.*

A traveling auditor of a foreign corporation, who presented an account to the plaintiff and requested payment to himself, but received no money and presented the account without authority, is not a "local agent" (under section 217 of The Code) for the purpose of service of summons. *Higgs v. Sperry*, 299.

The statute, which authorizes service of summons against non-resident insurance companies upon the Commissioner of Insurance, does not abrogate or affect the suspension of the running of the statute in such case. *Green v. Insurance Co.*, 309.

SERVICE OF PROCESS ON INFANT. See "Guardian and Ward."

SETTLE, JUDGE THOS. "Presentation of Portrait of," 649.
"Acceptance by the Chief Justice," 707.

SHELLEY'S CASE, RULE IN. See "Rule in Shelley's Case."

SHERIFF'S DEED. See "Tax Title."

SHIPPING. See "Carriers."

SHORTAGE IN ACRES. See "Reformation and Correction."

SOLICITORS, ARGUMENT OF. See "Argument of Counsel."

SPECIAL CONTRACTS. See "Contracts."

SPECIFIC PERFORMANCE. See "Contracts."

SPIRITUOUS LIQUORS. See "Intoxicating Liquors."

STATUTES. See "Criminal Statutes;" "Provisos."

Chapter 434, Laws of 1903, making it unlawful to sell any drink *containing alcohol*, is not repealed by chapter 497, Laws 1905, which prohibits the sale of spirituous, vinous or malt liquors or other *intoxicating drinks* and repeals all previous statutes in conflict. *State v. Parker*, 586.

Under the provisions of section 20, chap. 800, Laws 1905, providing that it shall be unlawful for any person to have in his possession more than two gallons of whiskey at any one time, and the possession of a greater quantity shall be *prima facie* evidence that such person is engaged in the illegal sale of liquor, the Legislature only intended to give the possession of more than two gallons of whiskey evidential force on the charge of illegal sale and did not intend to make the possession of such quantity of whiskey in itself a crime. *State v. McIntyre*, 599.

STATUTE OF FRAUDS. See "Fraud."

STATUTE OF LIMITATIONS. See "Limitation of Action."

STATUTE OF USES. See "Trusts and Trustees."

STOCK AND STOCKHOLDERS.

Where the plaintiff's stock in the defendant company was advertised for sale for failure to pay a certain amount due thereon, and the plaintiff before the sale tendered the secretary of the company in cash more than said amount and told him he would tender more if that was not enough, and the secretary did not allege that any more was due, but simply declined to accept payment, *held*, this was a legal tender and the subsequent sale of the stock was void. ***Wilson v. Telephone Co.***, 395.

Where the plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest to the date of tender and cost of advertisement. *Wilson v. Telephone Co.*, 395.

STREETS AND SIDEWALKS. See "Eminent Domain."

SUBROGATION.

When the insurer against fire has paid the loss sustained, it is subrogated to the rights of the insured and can alone, under section 177 of The Code, as the real party in interest, maintain an action against the wrongdoer, and this right to be subrogated is independent of section 44, chapter 54, Laws 1899, and it is immaterial whether the insured makes an actual assignment or not. *Cunningham v. Railroad*, 427.

If, after knowledge of the payment of the loss by the insurer, the wrongdoer pays the damages sustained by the destruction of the property, such payment will not bar the action of the insurer to recover upon his subrogated right. *Cunningham v. Railroad*, 427.

SUBSCRIBING WITNESSES.

Where a witness to a will held the pen while his entire name was written, *animo testandi*, at the request of the testator and in his presence, he is an effectual subscribing witness, and this is not affected by the fact that such witness was at the time able to write his own name. *In re Will of Elijah Pope*, 484.

SUFFICIENCY OF EVIDENCE. See "Evidence."

In an action for damages for an injury from a collision, evidence which merely shows that it was possible that the failure to stop the train caused the injury, or merely raises a conjecture that it was so, is legally insufficient and should not be submitted to the jury. *Kearns v. Railroad*, 470.

SUFFICIENCY OF EVIDENCE—*Continued.*

Evidence should raise more than a mere conjecture as to the existence of the fact to be proved. *Campbell v. Everhart*, 503.

When this court says that there is no evidence to go to the jury, it is not meant that there is literally and absolutely none, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established. *Campbell v. Everhart*, 503.

SUMMARY PUNISHMENT. See "Contempts."

SUMMONS. See "Service of Process."

SUPERIOR COURTS. See "Courts, Power of."

SUPERVISORS OF ROADS. See "Roads."

SUPPORT, ACTION FOR.

In an action for support under section 1292 of The Code, a judgment of nonsuit was proper, where it appeared that the plaintiff, who was at that time domiciled in Massachusetts, brought a suit in that State to obtain an absolute divorce from the defendant, who appeared and answered and set up a decree of absolute divorce of a North Dakota court in bar of the plaintiff's demand, and that the Massachusetts court, after full hearing, dismissed the suit on the ground that the North Dakota decree was valid, and that the status of the parties was not that of husband and wife. *Bidwell v. Bidwell.* 402.

SUPREME COURT. See "Amendment to Pleadings;" "Rules of Supreme Court."

SURETYSHIP. See "Principal and Surety.

SURVIVORSHIP.

Where a conveyance is made to the husband and wife and three children, the husband and wife are together seized of one-fourth by entireties, and the children of one-fourth each, and upon the death of the wife, the husband acquires the one-fourth by right of survivorship. (Dictum in *Hampton v. Wheeler*, 99 N. C., 222, corrected). *Darden v. Timberlake*, 181.

SWAMP LANDS.

In an action brought by plaintiffs for the purpose of having vacated and cancelled a grant issued to the defendant upon the ground that the land was not the subject of entry and grant as it was swamp land and was vested in the plaintiffs under section 2506 of The Code, an instruction that the jury must

SWAMP LANDS—*Continued.*

be satisfied by the greater weight of the evidence that the land described in the complaint is swamp land before they could find for the plaintiffs, was proper, though the plaintiffs were in possession of the land when the suit was commenced. *Board of Education v. Makely*, 31.

TAXATION.

An officer of a foreign corporation coming into this State and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business of hiring hands," etc., and is not liable for the tax on emigrant agents, under Revenue Act of 1905. *Lane v. Commissioners*, 443.

The license tax provided for in Laws 1905, chap. 259, is simply a mode of regulating the use of the public roads and requiring that those desirous of using them, for extraordinary purposes, as hauling heavy lumber and logs over the roads in unusually heavy vehicles, shall not do so without taking out a license for such unusual and extraordinary and injurious use of the public highway, and paying a license tax for the privilege. *State v. Holloman*, 642.

It is for the Legislature to prescribe by what methods the roads shall be worked and kept in repair,—whether by labor, by taxation of property, or by funds raised from license taxes, or by a mixture of two or more of these methods—and this may vary in different counties and localities. *State v. Holloman*, 642.

TAX TITLE.

A sale and conveyance by the sheriff under the Revenue Act of 1874-5, of the lands of a life tenant for default in payment of taxes on his part, does not operate to convey the interest of the remaindermen. *Smith v. Proctor*, 314.

A tax title which conveys only the interest of the life tenant, is not color of title against the remaindermen, nor is possession thereunder adverse until the death of the life tenant. *Smith v. Proctor*, 314.

TELEGRAPHS.

The addressee of a telegram, where there has been a wrongful failure to deliver, or negligent error in transmission, may, under certain circumstances, recover compensatory damages for mental anguish, where the message is for his benefit or concerns his domestic or social interests, and this independent of any bodily or substantial pecuniary injury. *Dayvis v. Telegraph Co.*, 79.

TELEGRAPHS—*Continued.*

In an action to recover for mental anguish for negligence in the transmission or delivery of a telegram, it is not necessary that the claimant should be a very near relative, nor that the telegram should contain a message concerning sickness or death, but it is necessary that the grievance complained of should amount to a high degree of mental suffering and not consist simply of annoyance or disappointment and regret. *Dayvis v. Telegraph Co.*, 79.

Before a recovery can be had for mental anguish, the telegraph company must be notified that mental anguish will naturally and reasonably follow as a result of its misconduct, either from the character and contents of the message itself or from facts within its knowledge, or brought to its attention at the time of accepting the message for transmission, or certainly in time to have enabled it to avoid the consequence complained of, by due care. *Dayvis v. Telegraph Co.*, 79.

In an action by the plaintiff to recover for mental anguish from the failure of the defendant to deliver the following message sent to him by his wife: "Got left. Be there at 7:30 o'clock tomorrow." Signed "D," the testimony of his wife that when she gave the message to the operator she told him she had been thrown over in Weldon, had two children with her, they were sick, her husband was to meet her and would be worried unless he got the message, is ample to notify the defendant that its failure to deliver the message might result in actionable suffering and mental anguish. *Dayvis v. Telegraph Co.*, 79.

In cases for mental anguish, in awarding the damages to be recovered, the law governing cases for breach of contract applies. *Dayvis v. Telegraph Co.*, 79.

In an action by the husband for mental anguish the admission of evidence of the privation and suffering of the wife and children would be reversible error but for the fact that in the charge the court withdrew it from the consideration of the jury. *Dayvis v. Telegraph Co.*, 79.

Where the court had in express terms told the jury that neither the privations of the wife nor her husband's mental anxiety, by reason of such suffering, should be considered by them, the addition that they should consider "only the mental anxiety of the husband by reason of these circumstances" could only mean such circumstances as under his charge should be held pertinent. *Dayvis v. Telegraph Co.*, 79.

A telegraph company is liable in damages for the mental anguish suffered by the husband by reason of the company's default in

TELEGRAPHS—*Continued.*

failing to deliver a message sent by the wife who had taken the wrong train, informing him of this fact, the purpose of the message being to prevent anxiety. *Sparkman v. Telegraph Co.*, 130 N. C., 447, overruled). *Dayvis v. Telegraph Co.*, 79.

A complaint alleged that the defendant negligently failed to deliver the following message sent by plaintiff from Newport News, Va., to Fayetteville, N. C.: "How is mother today? Let me know at once and I will come at once," and that by reason thereof the plaintiff suffered mental anguish, knowing that his mother was sick and that he was forced to go to Fayetteville, at great expense, and that when he reached there he found his mother better, *held*, that a demurrer for that no mental anguish was recoverable was properly overruled, as the cost of the trip is an element of damage, and the allegation as to mental anguish is not stated as a separate cause of action, but as a further element of damage. *Hall v. Telegraph Co.*, 369.

TENANTS BY ENTIRETY.

Where a conveyance is made to the husband and wife and three children, the husband and wife are together seized of one-fourth by entireties, and the children of one-fourth each, and upon the death of the wife, the husband acquires the one-fourth by right of survivorship. (Dictum in *Hampton v. Wheeler*, 99 N. C., 222, corrected). *Darden v. Timberlake*, 181.

TENANTS IN COMMON.

Under a deed to "S and wife A, and their heirs, including the former children of said A by another husband," the plaintiffs, who are A's children by the former husband, and were living at the time of the execution of the deed, took as grantees and as tenants in common with S and A. *Darden v. Timberlake*, 181.

By virtue of section 1328 of The Code, a child if *en ventre sa mere* at the time the deed was executed took as tenant in common with the living children. *Campbell v. Everhart*, 503.

TENDER.

Where the plaintiff's stock in the defendant company was advertised for sale for failure to pay a certain amount due thereon, and the plaintiff before the sale tendered the secretary of the company in cash more than said amount and told him he would tender more if that was not enough, and the secretary did not allege that any more was due, but simply declined to accept payment, *held*, this was a legal tender and the subsequent sale of the stock was void. *Wilson v. Telephone Co.*, 395.

THE CODE. See "Code, The."

TIMBER CONTRACTS. See "Deeds."

TIMBER LANDS. See "Injunctions;" "Eminent Domain."

TITLE. See "Ejectment."

TITLE TO REAL ESTATE IN CONTROVERSY.

In an action for rent begun before a justice of the peace where the defendant denied plaintiff's title and lease, the justice properly dismissed the action. *Hudson v. Hodge*, 308.

TORTS. See "Malicious Prosecution;" "Abuse of Process;" "False Imprisonment."

TOWNS. See "Municipal Corporations."

TRACK SCALES. See "Corporation Commission."

Under the act creating the Corporation Commission, it has the power to require a railroad to put in track scales at such points as the quantity of business may justify it. *Corporation Commission v. Railroad*, 126.

This power cannot be unreasonably exercised, and such orders are subject to review by the Superior Court and by this court. *Corporation Commission v. Railroad*, 126.

It is not the number of shippers, but the number of car loads to be weighed, which is the test whether it is reasonable to have facilities for weighing car loads upon track scales at a station, and it is immaterial that the petition affected only one point and one shipper. *Corporation Commission v. Railroad*, 126.

TRAMWAYS.

The amendment made to sections 2056-2057 of The Code, by chapter 46, Laws of 1887, in so far as it authorizes owners of timber lands to condemn a right of way for tramways or railways over the lands of other owners for the exclusive use of the owners of the timber, is unconstitutional, in that private property can only be taken for a public use. *Cozard v. Hardwood Co.*, 283.

TRANSACTIONS WITH DECEASED. See "Evidence."

TRAVELING AUDITOR. See "Service of Process."

TRESPASS. See "Waste, Action for."

TRIALS. See "Practice."

Where at the first trial of the case judgment was entered for the defendants and the plaintiff appealed and a new trial was

TRIALS—*Continued.*

granted, and at the second trial, the defendants again recovered and in the judgment, the plaintiff was taxed with all the costs of the defendants in the action, except the costs of appeal, *held*, the plaintiff's exception to the judgment upon the ground that he was not taxable with any of the costs of the first trial, was without merit; sections 525-6 and 540 of The Code, relating to taxation of costs, refer to a final recovery upon the merits. *Williams v. Hughes*, 17.

Where two issues are independent of and clearly severable from the others, it presents a proper case for the exercise of the discretion of this court to restrict the new trial to said two issues. *Yarborough v. Hughes*, 199.

TRUSTS AND TRUSTEES.

The bank occupied the relation of trustee, and as such it held the collaterals, and it was its duty to protect them. Questions of public policy, such as usury or encouraging litigation, are not involved. *Lumber Co. v. Pollock*, 174.

Where property was conveyed in trust for M during her life, with power of appointment, and on her failure to make the appointment in trust to surrender and deliver up said property to such child, etc., as may be living at her death, and M died in 1903, *held*, that possession by the defendant of said property since 1856, claiming to own the same in fee simple, under a deed from W, who had no title, is adverse to the trustee and bars the plaintiffs, who are the child and grandchild of M. *Kirkman v. Holland*, 185.

A trust, declared in a deed to a trustee which imposed the duty upon the trustee to convey the legal title when directed by M, and in default of such instruction to surrender and deliver it up to such child, etc., as M might leave surviving, is not of that class which is executed by the statute of uses. *Kirkman v. Holland*, 185.

When the trustee, in an active trust, is barred by the statute of limitations, the *cestui que trustent* are also barred. *Kirkman v. Holland*, 185.

A trustee will take by implication of law a fee in the estate when the duties of the trust require it, although the conveyance is in terms of life estate or fails to use the word "heirs." *Smith v. Proctor*, 314.

Where a deed conveyed a tract of land to a trustee and his survivors, in trust for H during his life, and in the event of H not leaving lawful issue, the trustee to convey to the heirs of

TRUSTS AND TRUSTEES—*Continued.*

G, but in case of lawful issue of H, then the trustee to make title to heir of H, the entire estate passed, the trustee holding for H during his life and then in trust to convey the land to the lawful children of H, and the exigencies of the trust having terminated on the death of H leaving children, the statute will execute the unnecessary portion of the estate. *Smith v. Proctor,* 314.

Where C agreed to sell the guano of O and to deliver to O notes of the planters to whom he sold, to be held by O as collateral security, and that all proceeds of guano sold were to be held by C in trust for the payment of his notes, O is entitled to the proceeds of the notes paid to the defendants as against the plaintiff to whom the lien bonds securing said notes were assigned, though the plaintiff had no notice of O's claim. *Chemical Co. v. McNair,* 326.

The death of a partner, in the absence of any stipulation in the articles of co-partnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts, and turn over to his personal representative the share of the deceased partner. *Walker v. Miller,* 448.

ULTRA VIRES ACTS. See "County Commissioners."

UNBORN CHILDREN.

By virtue of section 1328 of The Code, a child if *en ventre sa mere* at the time the deed was executed took as tenant in common with the living children. *Campbell v. Everhart,* 503.

A census list (found in the clerk's office) was not competent evidence to show that one of the grantees was not *in esse* at the date of the deed—census reports being competent only to prove facts of a public nature. *Campbell v. Everhart,* 503.

USAGE. See "Custom."

USURY.

The profit realized by the defendant, even if excessive, would not amount to usury, unless it was a mere device to cover and conceal an usurious transaction, and this would depend upon the intent with which the increase was exacted and in the absence of a finding of unlawful intent, the transaction will not be declared usurious. *Yarborough v. Hughes,* 199.

VACANT LANDS.

Where, in proceedings under the laws relating to entry of vacant lands, it was admitted by the plaintiffs (protestants) that

VACANT LANDS—*Continued.*

they could not show possession of any part of the land except during the years 1874-1876, nor any paper writing to any person for any part of the land covered by said entry, except three deeds which failed to connect the plaintiffs in any way with the land, the court properly dismissed the proceedings. *Johnson v. Wescott,* 29.

In an action brought by plaintiffs for the purpose of having vacated and cancelled a grant issued to the defendant upon the ground that the land was not the subject of entry and grant as it was swamp land and was vested in the plaintiffs under section 2506 of The Code, an instruction that the jury must be satisfied by the greater weight of the evidence that the land described in the complaint is swamp land before they could find for the plaintiffs, was proper, though the plaintiffs were in possession of the land when the suit was commenced. *Board of Education v. Makely,* 31.

VENUE OF ACTIONS.

Chapter 367, Acts 1905, amending section 192 of The Code, with reference to the place of trial of actions against railroads, applies to all railroads, both domestic and foreign. *Propst v. Railroad,* 397.

The amendment of 1905 does not repeal section 194, but the latter will be confined to corporations, other than railway companies, which have been chartered by any other State, government or country. *Propst v. Railroad,* 397.

VERDICT, IMPEACHMENT OF.

An exception to the refusal of the court to set aside the verdict, because several of the jurors signed a paper to the effect that they did not fully understand the issues and the legal effect of their findings, is without merit, as jurors cannot be heard to impeach their verdict. *Coxe v. Singleton,* 361.

VINDICTIVE DAMAGE. See "Damages."

VOTER.

The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever required by the statutes regulating the registration of voters. *Clark v. Statesville,* 490.

The making of a permanent roll or record was intended to be done for the sole purpose of furnishing convenient and easily available evidence of the fact that those whose names appear there-

VOTER—*Continued.*

on are not required to have the educational qualifications. *Clark v. Statesville*, 490.

When the law requires that a majority of the qualified voters should have cast their votes for a given proposition before it becomes a law, it means a majority of the registered voters. *Clark v. Statesville*, 490.

WAREHOUSEMEN. See "Carriers."

Where goods were placed upon the defendant's wharf and the plaintiffs, consignees, were notified of their arrival and paid the freight and commenced to remove them, the defendant's responsibility as a common carrier thereby terminated, and any obligation which remained was that of warehouseman or wharfinger, and the standard of conduct is that of ordinary care. *Stone v. Steamship Co.*, 193.

When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. *Trouser Co. v. Railroad*, 382.

WARRANTY. See "Covenants of Warranty;" "Deeds;" "Deceit."

There is no implied warranty in the sale of real estate when made otherwise than by judicial decree, either as to quantity, title, or encumbrance, and the cases in which the courts have relieved the purchaser at a judicial sale by reason of a defect of title or shortage, have been usually instances in which such matters have been called to the attention of the court prior to confirmation and payment, and while the sale was under the control of the court. *Peacock v. Barnes*, 196.

WASTE, ACTION FOR.

While the owner of the inheritance, either by way of reversion or vested remainder can maintain an action for waste, yet one entitled to a contingent remainder cannot maintain such an action, but the interest of a contingent remainderman in the timber will be protected by a Court of Equity by injunction. *Latham v. Lumber Co.*, 9.

Where lands were devised to a daughter for life "and after her death, the said lands are to go to the children of my said daughter and the children of such as are dead," and the life tenant who is living, had several children, one of whom married and died, leaving the plaintiffs the issue of such marriage,

WASTE, ACTION FOR—*Continued.*

held, the plaintiffs have but a contingent remainder, which may never vest, and they cannot during the life of the life tenant maintain an action for waste for timber cut. *Latham v. Lumber Co.*, 9.

WHARFINGER. See "Warehousemen."

WILLS.

Where by a clause in a will, land is given to P "for life, and after his death to his heirs (lawful) forever," P took an estate in fee simple under the Rule in Shelley's Case. *Pitchford v. Limer*, 13.

Where a will gave to a son who resided in Mississippi, the privilege of coming back to North Carolina and taking certain land, or remaining where he was, and receiving other benefits under its terms, and he preferred to remain in Mississippi and elected to take other property bestowed upon him by the will, *held*, the estate in said land never vested in him, it being an executory devise dependent upon a contingency which did not occur, and the doctrine that conditions in restraint of alienation are void has no application. *Pitchford v. Limer*, 13.

A person indebted cannot, by devising his lands, upon contingent limitations to parties not *in esse*, prevent their sale for payment of his debts until all who may by possibility take are born or every possible contingency is at an end. *Carraway v. Lassiter*, 145.

In the absence of an order to suspend further proceedings upon the filing of a *caveat*, as provided by section 2160 of The Code, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. *Carraway v. Lassiter*, 145.

Defendant's intestate in January, 1861, was bequeathed, among other legacies, $500 in money to her and her heirs forever, and if she died leaving no child, said money to go to plaintiff's intestate and her heirs. Defendant's intestate died in 1903, leaving no child, and plaintiff's intestate died in 1887. In this action, brought to recover the $500, alleging that the legacy had been paid to defendant's intestate, the following evidence: 1. The will. 2. The inventory and account sale filed in 1861, showing $13,000. 3. Report of commissioner showing that in September, 1863, there was in the hands of executors $14,000 due the legatees, none of whom had then been paid. 4. Receipts from two of the legatees in 1868, acknowledging receipt of a much smaller amount than their legacies, in full of all due

WILLS—*Continued.*

from said executor, was properly held no evidence of payment of said $500 legacy to defendant's intestate. *Outlaw v. Garner,* 190.

The presumption of payment from the lapse of time arises only between the executor and legatee, between debtor and creditor, it being a protection to discharge a liability and it cannot arise to create a liability to a third person on the part of the person who should have received the legacy. *Outlaw v. Garner,* 190.

To create any liability on the part of the legatee over to the remainderman, there must be proof that the legatee recovered the sum. *Outlaw v. Garner,* 190.

Where the clerk of the court of G. county issued a notice to the respondent who had the will of the deceased in his possession to exhibit the same for probate, it was the duty of the respondent to obey the summons and if he could have raised in his answer the question of whether the will should be probated in G. or L. county. *In re Scarborough Will,* 423.

Where a witness to a will held the pen while his entire name was written, *animo testandi,* at the request of the testator and in his presence, he is an effectual subscribing witness, and this is not affected by the fact that such witness was at the time able to write his own name. *In re Will of Elijah Pope,* 484.

WITNESSES. See "Evidence;" "Subscribing Witnesses."

Where the plaintiff's witness, on cross-examination, testified to the good character of the defendant, a question on redirect examination, as to whether he had not heard that the defendant had committed certain offenses, was properly excluded. *Coxe v. Singleton,* 361.

WRITS. See "*Habeas Corpus;*" "Injunctions."

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